

United States
Circuit Court of Appeals

For the Ninth Circuit.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian Ad Litem, MARY MURRAY,

Plaintiffs in Error,

VS.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

FEB 14 1916

F. D. Menckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MARY MURRAY and LENA MURRAY, a Minor,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Plaintiffs in Error:

MILTON K. YOUNG, Esq., 716 Union Oil
Bldg., Los Angeles, California.

THEODORE A. BELL, Esq., San Francisco,
California.

For Defendant in Error:

Messrs. HENRY T. GAGE and W. I. GIL-
BERT, 1206-10 Merchants Nat. Bank
Bldg., Los Angeles, California. [4*]

*In the District Court of the United States, Ninth Cir-
cuit, in and for the Southern District of Cali-
fornia, Southern Division.*

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America, to
the Judges of the Circuit Court of the United
States, of the Ninth Circuit, in and for the
Southern District of California, Greeting:

Because in the record and proceedings, and also

*Page number appearing at foot of page of original certified Record.

in the rendition of the judgment of a plea which is in the said Circuit Court before you, between Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, plaintiffs in error, and Southern Pacific Company, a corporation, defendant in error, a manifest error hath appeared to the great damage of said plaintiffs in error, Mary Murray and Lena Murray, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco in the State of California, [5] on the 3d day of December, 1915, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid be inspected, the said United States Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 4th day of November, in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the

United States the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of
the Ninth Circuit, in and for the Southern Dis-
trict of California.

By Chas. N. Williams,

Deputy Clerk.

The above writ of error is hereby allowed.

BENJAMIN F. BLEDSOE,

Judge. [6]

[Endorsed]: No. 279—Civ. In the District Court
of the United States, Ninth Circuit, in and for the
Southern District of California, Southern Division.
Mary Murray et al., Plaintiffs, vs. Southern Pacific
Company, a Corporation, Defendant. Writ of
Error. Filed Nov. 9, 1915. Wm. M. Van Dyke,
Clerk. By R. S. Zimmerman, Deputy Clerk. [7]

*In the District Court of the United States, Ninth Cir-
cuit, in and for the Southern District of Cali-
fornia, Southern Division.*

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Citation [Original].

To the Southern Pacific Company, a Corporation,
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 3d day of December, 1915, pursuant to a writ of error on file in the clerk's office of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Southern District of California, in that certain action No. 279, wherein Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said plaintiffs Mary Murray and Lena Murray, in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable BENJAMIN F. BLEDSOE, United States District Judge of the Southern District of California, this 8 day of November, 1915, and of the Independence of the United States the one hundred and thirty-ninth.

BENJAMIN F. BLEDSOE,
United States District Judge for the Southern District of California. [8]

[Endorsed]: #219—Civil. In the District Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.

Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Citation. Filed Nov. 9, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk.

Received copy of within this 9th day of November,

HENRY T. GAGE.

W. I. GILBERT. [9]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 279—CIVIL.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant. [10]

In the Superior Court of the State of California, in and for the County of San Luis Obispo.

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Certified Copy of Transcript of Record on Removal.
[11]

*In the Superior Court of the State of California, in
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Complaint.

Plaintiffs complain of the defendant and for cause
of action allege:

I.

That the plaintiff Lena Murray is a minor of the
age of eleven years, and that on the 11th day of July,
1913, by an order duly made and entered in the above-
entitled court, the said Mary Murray was duly and
regularly appointed guardian *ad litem* to represent
said minor in the prosecution of this action.

II.

That the plaintiff Mary Murray is the surviving
wife of Henry Murray, deceased; that said Lena
Murray is the only child of said deceased; and that
the plaintiffs herein are the only heirs at law of said
deceased.

III.

That the defendant now is and at all times herein mentioned was a railroad corporation organized and existing under and by virtue of the laws of the State of Kentucky.

IV. [12]

That on May 30th, 1913, and for several years immediately prior thereto, the defendant owned and operated a steam railroad in the State of California, running from San Francisco southerly to Los Angeles, and upon which line of railroad the defendant operated regular passenger trains for the transportation of persons for hire.

V.

That on the afternoon of May 30th, 1913, the said Henry Murray, hereinafter referred to as Murray, took passage upon one of the defendant's passenger trains from San Francisco to Santa Margarita, a way station on said line of railroad, and paid to the defendant the fixed and established fare for his transportation between said last two mentioned points.

VI.

That at all times herein mentioned it was the rule, custom and practice of the defendant to discharge its passengers at said way station in the night-time upon the east side of its trains only, where sufficient lights were provided and maintained by the defendant for the convenience and safety of passengers alighting from said trains; and that no lights of any kind or character were provided or maintained by the defendant at said way station on the west side of said trains.

VII.

That on the evening of May 30th, 1913, at about ten o'clock, and as said train was approaching said way station, the said Murray, who was then seated in the smoking-car of said train, was invited and directed by one E. M. Mulville, then and there employed as a brakeman on said passenger train by the defendant, [13] to follow said brakeman to the front platform of the car immediately behind said smoking-car, and to alight from said train; that by reason of said invitation and direction, and not otherwise, said Murray immediately followed said brakeman to said platform, whereupon the said brakeman lifted up and opened a trap-door that closed and covered the steps that led down from said platform on the west side of the train, and while said train was moving into said station at the rate of about twenty miles per hour, the said brakeman directed the said Murray to descend said steps and to alight from said train; that, as was then and there well known by said brakeman, said Murray was wholly unfamiliar with said station, its grounds and approaches, and wholly ignorant of the rule, custom and practice of discharging passengers, in the night-time, only on the east side of said train at said way station; and said Murray did not know that no lights were provided or maintained on the west side of said trains at said way station; that there was not sufficient light, either upon said train or at said station, to enable said Murray to descend said steps with safety, all of which was then and there well known to said brakeman at the time he opened said trap-door and directed the

said Murray to descend said steps and get off said train; that by reason of said invitation and direction of said brakeman, given and made by him to said Murray at the time and in the manner aforesaid, and replying upon the said conduct of said brakeman, and believing therefrom that he could descend said steps and alight from said train with safety, the said Murray, in the presence of said brakeman, proceeded to descend said steps; that said brakeman, with full knowledge of the dangerous position in which he had caused said Murray to be placed, wholly failed and omitted to warn or caution the said Murray of the danger and peril thereof; that said Murray, in so descending [14] said steps, lost his foothold thereon, by reason of the insufficient light and the motion of said train, and fell to the ground with great force and violence, thereby sustaining physical injuries from which he died the following day.

VIII.

That each and all of the aforesaid acts and omissions of said brakeman were negligently done and omitted, and in negligent disregard of the duty which the defendant owed to said Murray as a passenger upon said train, as aforesaid; and that the injuries to said Murray, resulting in his death, as aforesaid, were not caused by any neglect or fault upon the part of said deceased.

IX.

That all of the matters and things set forth in paragraph VII of this complaint occurred in the county of San Luis Obispo, State of California.

X.

That plaintiffs have been damaged in the premises

in the sum of fifty thousand dollars (\$50,000).

WHEREFORE plaintiffs pray judgment for the sum of fifty thousand dollars, and for costs of suit.

THEODORE A. BELL,
Attorney for Plaintiff.

LAMY & PUTNAM,
Of Counsel.

[Endorsed]: Filed Aug. 11th, 1913. F. J. Rodrigues, Clerk. [15]

*In the Superior Court of the State of California, in
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Demurrer to Complaint.

The defendant, Southern Pacific Company, a corporation, demurs to the complaint of plaintiffs on file in the above-entitled action and as ground of demurrer thereto it specifies:

That said complaint does not state facts sufficient to constitute a cause of action.

W. H. SPENCER,
Attorney for Defendant.

[Endorsed]: Copy of the within demurrer received this 11th day of October, 1913.

THEO. A. BELL, J.,
Attorney for Plaintiffs.

LAMY & PUTNAM,
Of Counsel, J.

[Endorsed]: Filed October 15th, 1913. F. J. Rodrigues, Clerk. ———, Deputy Clerk. [16]

*In the Superior Court of the State of California, in
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

**Petition for Removal of Cause to United States
District Court.**

To the Honorable, The Superior Court of the State
of California, in and for the County of San Luis
Obispo:

Your petitioner, Southern Pacific Company, respectfully shows:

I.

That it is the defendant in the above-entitled suit or action. Said suit, as appears from the complaint therein, is of a civil nature at law brought by plain-

tiff to recover judgment against defendant, your petitioner, in the sum of Fifty Thousand Dollars (\$50,000), and costs of suit, which claim your petitioner wholly contests and denies, and alleges that the amount involved in said action, exclusive of interest and costs, exceeds the value of Three Thousand Dollars. [17]

II.

That at the time of the commencement of said suit, said Southern Pacific Company, your petitioner, was, ever since has been and still is, a railroad corporation incorporated and existing under the laws of the State of Kentucky and a citizen and resident of said State and a nonresident of the State of California. At the time of the commencement of said suit, plaintiffs Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, and Lena Murray were, ever since have been and now are citizens of the State of California and residents of the Northern District of said State.

III.

At the time of the commencement of this suit, there was, ever since has been and still is, therein, a controversy wholly between citizens of different states which can be fully determined between them, that is to say, between plaintiffs, Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, and Southern Pacific Company, defendant and petitioner herein.

IV.

Service of summons was made in said suit on your petitioner on the 16th day of September, 1913, and

not before said day, in the city and county of San Francisco, State of California, and your petitioner is not required by the laws of the State of California, or the rules of the above-named Superior Court in which said suit is brought, to answer or plead to the complaint of plaintiffs therein until the 16th day of October, 1913.

V.

Your petitioner files and offers herewith its bonds with good and sufficient surety for its entering in the District Court [18] of the United States, Southern Division of Southern District of California, within thirty days from the date of filing of said petition for removal of said cause, a certified copy of the record in said suit and for paying all costs that may be awarded by the said District Court if said Court shall hold that said suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays this Honorable Court to accept said bond as good and sufficient and to make its order for the removal of said cause to the District Court of the United States for the Southern Division of the Southern District of California, pursuant to the Act of Congress in such cases made and provided, and such other and further order as may be proper, and to cause the record herein to be removed to said District Court and that no other or further proceedings be had in said Superior Court.

SOUTHERN PACIFIC COMPANY.

[Corporate Seal]

By G. L. KING,
Assistant Secretary.

W. H. SPENCER,

Attorney for Petitioner. [19]

State of California,
City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says:
That he is an officer, to wit, the assistant secretary of
Southern Pacific Company, petitioner named herein;
that he has read the foregoing petition and knows the
contents thereof and that said petition is true of his
own knowledge, except as to the matters which are
therein stated on his information or belief, and as to
those matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 11th day
of October, 1913.

[Notarial Seal] E. B. RYAN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed October 15th, 1913. F. J. Rod-
rigues, Clerk. By T. A. Luttrell, Deputy Clerk.
[20]

*In the Superior Court of the State of California, in
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Bond for Removal.

KNOW ALL MEN BY THESE PRESENTS: That Southern Pacific Company, a corporation duly incorporated and existing under laws of the State of Kentucky, and a resident of said State, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, which said corporation has complied with the laws of the State of California with reference to doing and transacting business in said State of California, as surety, are held and firmly bound unto Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, plaintiffs in the above-entitled action, in the penal sum of One Thousand Dollars (\$1,000), for payment whereof well and truly to be made unto said Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, their heirs, executors, administrators or assigns, we bind ourselves, our successors and assigns, jointly and severally firmly by these presents. [21]

Sealed with our seals and dated in the city and county of San Francisco, State of California, this 11th day of October, 1913.

WHEREAS said Southern Pacific Company has petitioned, or is about to petition, the above-named Superior Court for the removal of the above-entitled cause or action therein pending, wherein said Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, are plaintiffs, and said Southern Pacific Company is defendant, to the District Court of the United States for the Southern

Division of the Southern District of California;

NOW, the condition of this obligation is such that if the said defendant, Southern Pacific Company, shall enter in said District Court of the United States in and for the Southern Division of the Southern District of California, within thirty days from the date of filing said petition for removal of said cause, a certified copy of the record in the above-entitled suit or action and shall pay all costs that may be awarded by said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and shall appear and enter special bail in said suit if special bail was originally requisite therein, then the above obligation shall be void, otherwise it shall remain in full force and effect.

WITNESS our hands and seals the day and year first above written.

SOUTHERN PACIFIC COMPANY.

[Corporate Seal]

By G. L. KING,
Assistant Secretary.

UNITED STATES FIDELITY AND
GUARANTY COMPANY.

By H. V. D. JOHNS,
Attorney in Fact.

[Corporate Seal]

W. S. ALEXANDER,
Attorney in Fact. [22]

State of California,

City and County of San Francisco,—ss.

On this 11th day of October, 1913, before me, E. B. Ryan, a notary public in and for the city and county of San Francisco, State of California, duly commissioned and sworn, personally appeared G. L. King,

known to me to be the assistant secretary of Southern Pacific Company, the corporation described in and that executed the foregoing bond, and acknowledged to me that said corporation executed said bond.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed by official seal at my office in the city and county of San Francisco, State of California, the day and year in this certificate first above written.

[Notarial Seal] E. B. RYAN,
Notary Public in and for the City and County of
San Francisco, State of California. [23]

State of California,
City and County of San Francisco,—ss.

On this 11th day of October, 1913, before me personally appeared H. V. D. Johns and W. S. Alexander, known to me to be the persons whose names are subscribed to the foregoing instrument as attorneys in fact for the United States Fidelity and Guaranty Company, and they acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as attorneys in fact.

[Notarial Seal] W. W. HEALEY,
Notary Public in and for the City and County of
San Francisco, State of California.

The foregoing bond is hereby approved this October 15th, 1913.

E. P. UNANGST,
Judge.

Filed October 15th, 1913. F. J. Rodrigues, Clerk.
By T. A. Luttrell, Deputy Clerk. [24]

*In the Superior Court of the State of California, in
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Notice of Petition for Removal.

To the Above-named Plaintiffs and to Theodore A.
Bell, Esquire, Attorney for Plaintiffs:

You, and each of you, will please take notice that Southern Pacific Company, the defendant in the above-entitled action, will on the 15th day of October, 1913, at 10 o'clock A. M., petition the above-entitled Court to remove said cause to the District Court of the United States in and for the Southern Division of the Southern District of California, by filing a petition and bond, copies of which are hereto attached and made a part hereof, reference to which is hereby expressly made for further particulars.

Dated October 11th, 1913.

W. H. SPENCER,

Attorney for Petitioner. [25]

[Endorsed]: Received copy of the within notice and copy of petition and bond for removal thereto

attached this 11th day of October, 1913.

THEO. A. BELL, J.,
Attorney for Plaintiffs.

LAMY & PUTNAM,
Of Counsel.

Filed October 15th, 1913. F. J. Rodrigues, Clerk.
By T. A. Luttrell, Deputy Clerk.

Attached to above notice are copies of the petition
for removal of cause to United States District Court,
and bond for removal as hereinafter set forth, viz.:
[26]

*In the Superior Court of the State of California, in
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

PETITION FOR REMOVAL OF CAUSE TO
UNITED STATES DISTRICT COURT.

To the Honorable, The Superior Court of the State
of California, in and for the County of San
Luis Obispo:

Your petitioner, Southern Pacific Company, re-
spectfully shows:

I.

That it is the defendant in the above-entitled suit or action. Said suit, as appears from the complaint therein, is of a civil nature at law brought by plaintiff to recover judgment against defendant, your petitioner, in the sum of Fifty Thousand Dollars (\$50,000), and costs of suit, which claim your petitioner wholly contests and denies, and alleges that the amount involved in said action, exclusive of interest and costs, exceeds the value of Three Thousand Dollars. [27]

II.

That at the time of the commencement of said suit, said Southern Pacific Company, your petitioner, was, ever since has been and still is, a railroad corporation incorporated and existing under laws of the State of Kentucky and a citizen and resident of said State and a nonresident of the State of California. At the time of the commencement of said suit, plaintiffs Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, and Lena Murray were, ever since have been and now are citizens of the State of California and residents of the Northern District of said State.

III.

At the time of the commencement of said suit, there was, ever since has been and still is, therein, a controversy wholly between citizens of different states which can be fully determined between them, that is to say, between plaintiffs, Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, and Southern Pacific Company, de-

fendant and petitioner herein.

IV.

Service of summons was made in said suit on your petitioner on the 16th day of September 1913, and not before said day, in the city and county of San Francisco, State of California, and your petitioner is not required by the laws of the State of California, or the rules of the above-named Superior Court in which said suit is brought, to answer or plead to the complaint of plaintiffs therein until the 16th day of October 1913.

V.

Your petitioner files and offers herewith its bond with good and sufficient surety for its entering in the District Court of the United States, Southern Division of Southern [28] District of California, within thirty days from the date of filing of said petition for removal of said cause, a certified copy of the record in said suit and for paying all costs that may be awarded by the said District Court if said court shall hold that said suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays this Honorable Court to accept said bonds as good and sufficient and to make its order for the removal of said cause to the District Court of the United States for the Southern Division of the Southern District of California, pursuant to the Act of Congress in such cases made and provided, and such other and further order as may be proper, and to cause the record herein to be removed to said District Court and that

no other or further proceedings be had in said Superior Court.

SOUTHERN PACIFIC COMPANY.

[Corporate Seal]

By G. L. KING,

Assistant Secretary.

W. H. SPENCER,

Attorney for Petitioner. [29]

State of California,

City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says: That he is an officer, to wit, the assistant secretary of Southern Pacific Company, petitioner named herein; that he has read the foregoing petition and knows the contents thereof and that said petition is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

G. L. KING.

Subscribed and sworn to before me this 11th day of October, 1913.

[Notarial Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California. [30]

*In the Superior Court of the State of California, in
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

BOND FOR REMOVAL.

KNOW ALL MEN BY THESE PRESENTS:

That Southern Pacific Company, a corporation duly incorporated and existing under laws of the State of Kentucky, and a resident of said State, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, which said corporation has complied with the laws of the State of California with reference to doing and transacting business in said State of California, as surety, are held and firmly bound unto Mary Murray and Lena Murray, a minor by her guardian *ad litem*, Mary Murray, plaintiffs in the above-entitled action, in the penal sum of One Thousand Dollars (\$1,000), for payment whereof well and truly to be made unto said Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, their heirs, [31] executors, administrators or assigns, we bind ourselves,

our successors and assigns, jointly and severally firmly by these presents.

SEALED with our seals and dated in the city and county of San Francisco, State of California, this 11th day of October, 1913.

WHEREAS said Southern Pacific Company has petitioned, or is about to petition, the above-named Superior Court for the removal of the above-entitled cause or action therein pending, wherein said Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, are plaintiffs, and said Southern Pacific Company is defendant, to the District Court of the United States for the Southern Division of the Southern District of California;

NOW, the condition of this obligation is such that if the said defendant, Southern Pacific Company, shall enter in said District Court of the United States in and for the Southern Division of the Southern District of California, within thirty days from the date of filing said petition for removal of said cause, a certified copy of the record in the above-entitled suit or action and shall pay all costs that may be awarded by said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and shall appear and enter special bail in said suit if special bail was originally requisite therein, then the above obligation shall be void, otherwise it shall remain in full force and effect.

WITNESS our hands and seals the day and year first above written. [32]

SOUTHERN PACIFIC COMPANY.

[Corporate Seal]

By G. L. KING,
Assistant Secretary.

UNITED STATES FIDELITY AND
GUARANTY COMPANY.

By H. V. D. JOHNS,
Attorney in Fact.

[Corporate Seal]

W. S. ALEXANDER,
Attorney in Fact.

State of California,
City and County of San Francisco,—ss.

On this 11th day of October, 1913, before me, E. B. Ryan, a notary public in and for the city and county of San Francisco, State of California, duly commissioned and sworn, personally appeared, G. L. King, known to me to be the assistant secretary of Southern Pacific Company, the corporation described in and that executed the foregoing bond, and acknowledged to me that said corporation executed said bond.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, State of California, the day and year in this certificate first above written.

[Notarial Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California. [33]

State of California,
City and County of San Francisco,—ss.

On this 11th day of October, 1913, before me personally appeared H. V. D. Johns and W. S. Alexander known to me to be the persons whose names are subscribed to the foregoing instrument as attorneys in fact for the United States Fidelity and Guaranty Company, and they acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as attorneys in fact.

[Notarial Seal] W. W. HEALEY,
Notary Public in and for the City and County of San
Francisco, State of California. [34]

*In the Superior Court of the State of California, in
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

**Order for Removal [of Cause to U. S. District
Court].**

Upon reading and filing petition and bond of defendant, Southern Pacific Company, for removal of

the above-entitled action to the United States District Court for the Southern Division of Southern District of California, and it appearing to the Court that written notice of said petition and bond for removal was given by defendant to plaintiffs prior to filing said petition and bond, and this matter duly coming on for hearing, said bond is hereby approved and accepted as good and sufficient and it is hereby ORDERED that said cause be, and the same is, hereby removed to the District Court of the United States for the Southern Division of Southern District of California.

Dated this 15th day of October, 1913.

E. P. UNANGST,

Judge.

[Endorsed]: Filed October 15th, 1913. F. J. Rodrigues, Clerk. By T. A. Luttrell, Deputy Clerk.
[35]

*In the Superior Court of the State of California, in
and for the County of San Luis Obispo.*

No. 5454.

MARY MURRAY and LENA MURRAY, a minor,
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
tion,

Defendant.

Certificate of Clerk of State Court on Removal.

I, F. J. Rodrigues, county clerk and ex-officio clerk of the Superior Court of the State of California, in and for the county of San Luis Obispo, hereby certify that I have compared the annexed and foregoing copies of complaint, demurrer, notice, petition and bond of defendant Southern Pacific Company for removal of cause to the United States District Court for the Southern Division of Southern District of California, and order for removal in the case of Mary Murray and Lena Murray, a minor, by her guardian ad litem, Mary Murray, plaintiffs, vs. Southern Pacific Company, defendant, and constituting the record in said cause, with the originals now on file in my office and that such annexed and foregoing copies are true and correct transcripts thereof, and of the whole of said originals.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 15th day of October, 1913.

[Seal]

F. J. RODRIGUES,
Clerk. [36]

[Endorsed]: No. 5454. Superior Court, County of San Luis Obispo, State of California. Dept. No. ——. Mary Murray and Lena Murray, a minor, by her Guardian *ad litem*, Mary Murray, Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Certified Copy of Transcript of Record on Removal. W. H. Spencer, Attorney for Petitioner, San Luis Obispo, California.

[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray. et al. vs. Southern Pacific Company. Certified Transcript of Record on Removal from Superior Court of San Luis Obispo County. Filed Oct. 22, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [37]

[Order Substituting Counsel for Plaintiffs, Overruling Demurrer, etc.]

At a stated term, to wit, the January Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the second day of February, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable OLIN WELLBORN, District Judge.

No. 279—CIVIL S. D.

MARY MURRAY et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

This cause coming on this day to be heard on defendant's demurrer to plaintiffs' complaint; now, on motion of Milton K. Young, Esq., and pursuant to the stipulation of the parties hereto by their solicitors of record, on file herein, it is ordered that Milton K. Young, Esq., and Theodore A. Bell, Esq., be, and they are hereby substituted in the place and stead

of Theodore A. Bell, Esq., as counsel for plaintiffs; thereupon, on motion of L. N. Turrentine, Esq., on behalf of counsel for defendant, it is ordered that defendant's said demurrer to plaintiffs' complaint be, and the same hereby is overruled, and that defendant be, and it hereby is assigned to answer said complaint within ten (10) days.

[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Copy Order Overruling Demurrer. Filed Nov. 30, 1914. Wm. M. Van Dyke, Clerk. By Leslie C. Colyer, Deputy.
[38]

*In the District Court of the United States of
America in and for the Southern District of
California, Southern Division.*

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Answer.

Now comes the said defendant and for answer to the complaint on file herein:

I.

Defendant has no knowledge, information or belief sufficient to enable it to answer as to any or either of the allegations contained in paragraphs I

to II of said complaint and basing its answer on said ground, denies each and every of the allegations of said paragraphs I and II of said complaint, generally and specifically.

II.

Defendant denies that at the times mentioned in said complaint or at any time, it was the rule, custom or practice of said defendant to discharge its passengers at said station of Santa Margarita, in the night-time or otherwise, upon the east side of its trains only, and defendant denies that at the time mentioned in said complaint or at any time, either as said train [39] was approaching said station or at all, the said Murray, either when seated in the smoking-car of said train, or at any time, was invited or directed by the said E. M. Mulville, or by any brakeman, agent, servant or employe of said train or elsewhere, either to follow said brakeman or any brakeman, to the front platform of any car or elsewhere, or at all, or to alight from the said train, whether as alleged in said complaint or otherwise or at all; and defendant denies that any invitation or direction whether as alleged in said complaint or otherwise or at all was given by said brakeman, or any agent, servant or employee of defendant to the said Murray, or that by reason of said invitation or direction, or otherwise or at all, the said Murray immediately or otherwise followed such brakeman, or any agent, servant or employee of said defendant to the platform mentioned in said complaint or elsewhere, and defendant denies that by reason of any invitation or direction mentioned in said complaint

or any invitation or direction whatsoever, the said brakeman lifted up or opened any trap-door, referred to in said complaint or otherwise, and defendant on the contrary alleges that said trap-door was opened by said brakeman at the request of said Murray, for his own convenience, and for the purpose of allowing him to alight from the steps thereof, when the said train should have come to a stop, and not otherwise; defendant denies that while said train was moving into said station or elsewhere at the rate of about twenty miles an hour, or while the same was moving at all, or at any rate, or at any time whatsoever, the said brakeman, or any agent, servant or employee of defendant directed the said Murray to descend said steps or to alight from said train or otherwise or at all, and on the contrary defendant [40] alleges that the said brakeman directed the said Murray not to descend said steps or to attempt to alight from said train until the same should have stopped and defendant denies that it was then a fact or that it was then or there well or at all known by or to said brakeman to be a fact, or by or to any agent, servant or employee of defendant to be a fact, that the said Murray was wholly or at all unfamiliar with said station or its grounds or approaches, or wholly or at all ignorant of any rule, custom or practice concerning discharging passengers, whether as alleged in said complaint or otherwise or at all, and defendant denies that the said Murray was unfamiliar with said station or its grounds and approaches, and alleges that the said Murray, by the exercise of any degree of care whatsoever, at and

immediately prior to the time of said accident, could have seen and known that the said train was still moving, and could have seen and known of the ground alongside said train and in the vicinity thereof, and in the place where he attempted to alight therefrom, and defendant denies as it has hereinabove denied that there was any rule, custom or practice whatsoever, of discharging passengers in the night-time or otherwise, only on the east side of said train at said station, and denies that there was any rule, custom or practice in reference to discharging passengers on such side of said train at all; and defendant has no knowledge, information or belief sufficient to enable it to answer as to whether the said Murray knew or did not know whether any lights were provided or maintained on the west side of said trains at said station or elsewhere, and basing its answer on said ground, denies the allegations of said complaint in respect thereto, and on said ground denies that the said Murray did not know that no lights were provided or maintained [41] on the west side of said trains at said way station or elsewhere; and defendant denies that there was not sufficient light either upon said train or at said station, nor in the vicinity thereof, to enable the said Murray to descend said steps with safety, or that all or any of said alleged matters and things were then or at any time or place well or at all known to said brakeman or any agent, servant or employee of defendant, either at the time mentioned in said complaint or at any time, and defendant on the contrary alleges that there was sufficient light both

within and without said train in the vicinity of the place of said accident, to have enabled the said Murray to descend the said steps with safety, if he had exercised any degree of care whatsoever in so doing; defendant further denies that said brakeman, or any agent, employee or servant of defendant directed the said Murray, either at the time mentioned in said complaint, or at any time whatsoever, to descend said steps or to get off said train; defendant denies that any such invitation or direction as mentioned in said complaint or any invitation or direction whatsoever, was given or made by said brakeman or any agent, servant or employee of defendant to said Murray, either at the time or in the manner mentioned in said complaint, or at any time or in any manner whatsoever, and denies that there was any conduct, act, or thing of said brakeman, or any agent, servant or employee of said defendant, upon which the said Murray relied or had any right to rely, either in getting on the steps of said train, or attempting to alight therefrom, or from which he believed or had any right to believe that he could descend said steps or alight from said train with safety, and defendant denies that said Murray proceeded to descend said steps, either by reason of any invitation or direction of said brakeman, or any agent, servant or employee of defendant, or in [42] reliance upon any conduct of said brakeman, or any agent, servant or employee of defendant, or in any belief therefrom, that he could descend said steps or alight from said train with safety; and denies that the said Murray proceeded to descend said steps

in the presence of said brakeman, or in the presence of any agent, servant or employee of defendant; and defendant denies that said brakeman or any agent, servant or employee of defendant had full or any knowledge of any dangerous position of the said Murray, or had caused the said Murray to be placed in any dangerous position, or with or without such knowledge, wholly or at all failed or omitted to warn or caution said Murray of any danger or peril whatsoever; and defendant denies that the said Murray, in so descending said steps or otherwise, whether as alleged in said complaint or otherwise or at all, lost his foothold thereon by reason of any insufficient light, by reason of the motion of said train, or thereby fell to the ground or elsewhere, or thereby sustained injuries, whether as alleged in said complaint or otherwise or at all; and defendant on the contrary alleges, that the said Murray, carelessly, negligently and recklessly attempted to descend said steps and to alight from the said train while the same was still in motion, and thereby and by reason of his own carelessness, negligence and recklessness and not otherwise, fell to the ground; defendant denies that the light in said vicinity was insufficient, and alleges on the contrary that the light was sufficient to have enabled the said Murray to have avoided said accident, by the exercise of any degree of care whatsoever; and defendant denies that the said accident, or the fall of the said Murray from said car, were caused or produced in any manner whatsoever, by the sufficiency [43] or insufficiency of any light at said place, or by the motion of

said train or otherwise than by the fault, carelessness and negligence of the said Murray himself.

III.

Defendant denies that the said brakeman, or any agent, servant or employee of defendant negligently did any act or omitted anything, or negligently or otherwise or at all disregarded any duty owing to the said Murray, as a passenger upon said train, or otherwise or at all; and denies that the injuries of the said Murray or his death, whether as alleged in said complaint or otherwise, were not caused by neglect and fault upon the part of said deceased himself; and defendant denies that it, or any of its agents, servants or employees, whether as alleged in said complaint or otherwise or at all, were guilty of any act or acts, fault, carelessness or negligence whatsoever, resulting in or producing or contributing to the injury or death of said Murray; and denies that by any act or acts, fault, carelessness or negligence of defendant or any of its agents, servants or employees, said Murray was injured or killed or the said plaintiffs either of them damaged in the sum of \$50,000 or any sum whatsoever.

IV.

Defendant denies that any invitation or direction was given to the said Murray, by any agent, servant or employee of defendant, to descend said steps or alight from said train, either while said train was moving at the rate of twenty miles an hour, or otherwise or at all, or at any time, and denies that said train was moving into said station at the rate of twenty miles an hour, and alleges that as the train

approached the said [44] station and before reaching the said station, the speed thereof was reduced, and that at the time the said Murray attempted to alight from said train, carelessly, recklessly and negligently as aforesaid, the said train was still moving, but at a rate of speed of less than ten miles an hour at said time. And defendant alleges that at said time the said Murray had gone onto the platform of said car and down upon the steps thereof, in violation of the rules and regulations of this defendant; that such rules and regulations were reasonable rules and regulations, duly promulgated by said defendant; that such rules and regulations were then and there in force, printed, and conspicuously posted on the inside of the passenger cars of defendant, and that the said Murray was injured by reason of his violation of such printed rules and regulations, and by reason of his violation of positive verbal instruction, and injunction given to him by the brakeman of said train.

AND FOR A FURTHER, SEPARATE AND DISTINCT DEFENSE, defendant alleges:

V.

That the said deceased, Murray, did not himself exercise ordinary care, caution or prudence for his own safety, and that his injuries and death, whether as alleged in said complaint or otherwise or at all, were directly and proximately contributed to and caused, by the fault, carelessness and negligence of the said Murray, deceased, and by his failure to exercise ordinary care, prudence and caution in the premises.

WHEREFORE, defendant prays judgment for its costs.

J. W. McKINLEY,
FRANK KARR,
R. C. GORTNER,
Attorneys for Defendant. [45]

State of California,
County of Los Angeles,—ss.

Frank Karr, being by me first duly sworn, deposes any says: That he is one of the attorneys for the defendant in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That he makes this verification for the reason that none of the officers of the defendant corporation reside within the county of Los Angeles.

FRANK KARR.

Subscribed and sworn to before me this 6th day of February, 1914.

[Seal] NAT B. BROWNE,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 279—Civil. No ——. Department ——. Superior Court, Los Angeles County, State of California. Mary Murray et al., Plaintiff vs. Southern Pacific Company, a Corporation, Defendant. Substitute Answer. Approved as Copy of Original and to be Filed in Lieu Thereof. M. K.

Young, of Counsel for Pltff. J. W. McKinley, 432 Pacific Electric Building, Cor. Sixth and Main Sts., Los Angeles, California, Attorney for Defendant. Filed by Order of Court, Dec. 10, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
[46]

[Verdict.]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 279—CIVIL.

MARY MURRAY, and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

We, the jury in the above-entitled action, find in favor of the plaintiffs in the sum of \$5,000.00.

Los Angeles, November 28th, 1914.

EDWARD D. SILENT,
Foreman.

[Endorsed]: No. 279.—Civil. U. S. District Court, Southern District of California. Southern Division. Mary Murray et al. vs. Southern Pacific Co. Verdict. Filed Nov. 28, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [47]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

No. 279—CIVIL, S. D.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
tion,

Defendant.

Judgment.

This cause having come on regularly on Friday, the 27th of November, 1914, being a day in the July term, A. D. 1914, of the District Court of the United States for the Southern District of California, Southern Division, for trial before the Court and a jury of twelve (12) men duly impaneled; Milton K. Young, Esq., and Theodore A. Bell, Esq., appearing as counsel on behalf of plaintiffs; W. I. Gilbert, Esq., appearing as counsel on behalf of defendant; and the trial having been proceeded with on the 27th and 28th days of November, 1914, and witnesses having been duly sworn and examined on behalf of the respective parties; and documentary evidence having been introduced on behalf of plaintiffs; and the evidence having been closed; and the cause, after argument by counsel for the respective parties, and the instructions of the Court, having been submitted to the jury on the 28th

of November, 1914; and the jury thereafter, on said 28th of November, 1914, having rendered the following verdict: [48]

“In the District Court of the United States, in and for the Southern District of California, Southern Division, Mary Murray and Lena Murray, a Minor, by her Guardian *ad Litem*, Mary Murray, Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. No. 279—Civil. We, the jury in the above-entitled action, find in favor of the plaintiffs in the sum of \$5,000. Los Angeles, November 28th, 1914. Edward D. Silent, Foreman.” And the Court having ordered that judgment be entered in accordance with said verdict in favor of the plaintiffs and against the defendant for the sum of Five Thousand (\$5,000) Dollars;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Mary Murray and Lena Murray, a minor, by her guardian *ad litem*, Mary Murray, plaintiffs herein, do have and recover of and from the Southern Pacific Company, a corporation, defendant herein, the sum of Five Thousand (\$5,000) Dollars, together with their, said plaintiffs' costs herein, taxed at \$65.40.

Judgment entered November 30, 1914.

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, South-

ern Division. Mary Murray and Lena, Murray, a Minor, by Her Guardian *ad Litem*, Mary Murray, vs. Southern Pacific Company, a Corporation. Copy of Judgment. Filed Nov. 30, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [49]

**[Certificate of Clerk U. S. District Court to
Judgment-roll.]**

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 279—CIVIL.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the judgment made and entered in the above-entitled action, and recorder in Judgment Register No. 2 of said court for the Southern Division, at page 270 thereof; and I do further certify that the foregoing papers hereto annexed, constitute the judgment-roll in said action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of November, A. D. 1914.

W. M. VAN DYKE,

Clerk.

[Seal]

By Leslie S. Colyer,

Deputy Clerk.

[Endorsed]: No. 279—Civil. In the District Court of the United States for the Southern District of California, Southern Division. Mary Murray et al. vs. Southern Pacific Company. Judgment-roll. Filed Nov. 30, 1914. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Recorded Judg. Register Book No. 2, page 270. [50]

In the District Court of the United States in and for the Southern District of California, Southern Division.

No. 279—CIVIL. Dept. 2.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Notice of Motion for New Trial.

To Mary Murray and Lena Murray, a Minor, by Her
Guardian *ad Litem* Mary Murray, Plaintiffs;
and to Messrs. Theodore A. Bell and Milton K.
Young, Their Attorneys:

YOU WILL PLEASE TAKE NOTICE that the defendant will move the Court to vacate and set aside the verdict of the jury herein rendered on November 27, 1914, and the judgment entered thereon in favor of plaintiffs and against defendant, and to grant a new trial in the said action, for the following reasons and upon the following grounds, to wit:

1. That the evidence is insufficient to justify the verdict;
2. That the verdict is against law; and,
3. For errors in law occurring at the trial, and excepted to by the defendant.

Said motion will be made upon the minutes of the Court, including the notes of the evidence taken by the Judge who tried the case, as well as upon all the evidence received in the case [51] and transcribed by the reporter, including all the rulings and instructions of the Court, made and given on the trial and excepted to by the defendant, and also upon all the pleadings, proceedings, records, and papers on file in the said cause.

And defendant now specifies the following particulars in which the evidence was insufficient to justify the verdict of the jury, to wit:

1. The evidence is insufficient to justify the verdict of the jury in finding that the defendant was

guilty of any negligence which was the proximate cause of the injury and death of plaintiffs' intestate;

2. The evidence is insufficient to justify the verdict of the jury in finding that the deceased was free from contributory negligence which was the proximate cause of the injury, and such contributory negligence as in law bars a recovery by plaintiffs;

3. The evidence is insufficient to establish any grounds of invitation to alight on the wrong, or any, side of the train, or before the train had reached the station of Santa Margarita, or to establish that the deceased did not voluntarily assume the risk, barring recovery.

4. The evidence is insufficient to establish that the deceased was misled by, or acted upon, any words or acts of the brakeman, Mulville, in pointing out to the deceased where the hotel was situated, or by the statement: "Here is where you fellows get off" by reason of which the deceased was led to believe that he could alight with safety from the moving train at the point where he attempted to alight. [52]

5. The evidence is insufficient to establish any basis for the conclusion that said brakeman invited or directed, or that the deceased so understood the remarks of said brakeman as an invitation or direction, to alight on the wrong side of the train, or that the deceased acted or relied upon such remarks when he attempted to alight on the side opposite from the station and sustained the injuries herein complained of.

6. The evidence is insufficient to justify the verdict of the jury in finding that the remarks of Brake-

man Mulville were made, or understood by the deceased to be made, in the course, or within the scope, of his employment, or that the opening of the trap-door on the side of the train opposite the station was understood by plaintiff's intestate as an invitation to him to use the steps leading therefrom in alighting from said train, and

7. The evidence is insufficient to justify the verdict of the jury in finding that plaintiff's intestate did not know and realize the speed at which the train was moving at the time he attempted to alight from said train and that it was hazardous for him to attempt to alight therefrom. [53]

And defendant now specifies the following errors of law occurring at the trial and properly excepted to by the defendant, to wit:

1. The Court erred in denying defendant's motion for a nonsuit at the close of plaintiff's testimony, which motion is in words and figures as follows, to wit:

“COMES NOW THE DEFENDANT, Southern Pacific Company, and moves the Court for a nonsuit for the reason that the testimony offered is insufficient in law to establish a cause of action in favor of the plaintiff and against the defendant company; for the reason that the testimony in the case fails to develop any act of negligence on the part of the company from which the accident complained of resulted; for the reason that if negligence on the part of the company has been shown as a matter of law in the opening of the platform door, the deceased himself contributed to the injury by attempting to alight

from the train while it was in motion and moving, as shown by the plaintiff's testimony, at about the rate of ten or twelve miles an hour; and for the reason that the plaintiff having seen fit to attempt to alight from a train on the nonplatform side and while the train was in motion assumed the risks and dangers which were incidental thereto."

2. The Court erred in permitting the witness, Edward Mulville, to answer the following question, propounded by counsel for plaintiffs:

"Were you not violating Rule No. 837 when you opened those vestibule doors before the train came to a standstill, and which question was duly objected to by counsel for the defendant. [54]

3. The Court erred in permitting the witness, A. B. Spear, over the objection of defendant, to answer the following question propounded to him by counsel for plaintiffs:

"Q. I asked you if you didn't testify as follows, and if that doesn't correctly state the fact: 'Would you understand *the* when Mr. Mulville opened this door, the vestibule door on the side of the train opposite from the depot to permit this passenger to alight on that side, that he was violating a rule of the company?

" 'A. Well, if the passenger was not to alight until the train had come to a stop, I think it would be perfectly safe.' "

4. The Court erred in refusing to give, at the request of counsel for defendant, the following peremptory instruction to the jury to return a verdict in favor of defendant, which requested instruction

(formal parts omitted) is in words and figures as follows, to wit:

“COMES NOW THE DEFENDANT, Southern Pacific Company, a corporation, in the above-entitled and numbered cause, and moves the Court to direct the jury to return a verdict in favor of the defendant, for the reason that the testimony is insufficient in law to establish a cause of action in favor of plaintiff and against defendant company.”

5. The Court erred in refusing to give the following instructions to the jury, at the request of counsel for defendant, and the refusal to give each of said instructions is here assigned as error, said instructions being in words and figures as follows, to wit:

“You are instructed that the ordinary care required of the defendant is that care which ordinary prudent railroads, their officers and employees engaged in the same kind of business commonly used under similar circumstances. In the absence [55] of proof to the contrary, the legal presumption is that the defendant faithfully discharged its duty. If you believe from the evidence that the defendant exercised this ordinary degree of care, you have no right to establish in your minds, and to require of the defendant, a higher standard of care and to find against the defendant because the care it used did not reach your own high and speculative standard.

II.

“In this case, the defendant presents two defenses by its answer: FIRST. That it was not guilty of negligence, and SECOND. That the deceased was guilty of contributory negligence. If from the evi-

dence you find that the accident happened without any fault or carelessness on the part of defendant amounting to want of ordinary care, then regardless of all other questions, your verdict must be for defendant. Should you find from the evidence that defendant was negligent, and that its negligence contributed to said injury, and that the deceased was also negligent and that his negligence contributed proximately to said injury, then your verdict must be for defendant.

III.

“The test of defendant’s liability is that defendant is not to be held responsible for a consequence which is merely possible according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. The defendant is bound to anticipate and provide against what usually happens, and what is likely to happen, but is never required to anticipate and provide against what is unusual and unlikely to happen, or what is only remotely and slightly probable. While a high degree of care and caution might, and perhaps would, guard against injurious consequences which are merely possible, yet the defendant is not required [56] to exercise such high degree of care; nor was it negligence on its part to omit such high degree of care, but the defendant is liable only for want of ordinary care for such injurious consequences as are usual and probable, or likely to happen and which ordinary care could have provided against.

IV.

“You are instructed, gentlemen of the jury, that

to entitle the plaintiff to recover in this action, it must appear from the evidence that the injury sustained by the deceased was occasioned by the carelessness or negligence on the part of defendant or its servants or employees as charged in the complaint; and if you believe from the evidence that the deceased was injured in consequence of his voluntary alighting from the car of defendant, at the time of the accident, when it was in motion, then your verdict should be for defendant.

V.

“You are instructed that if you should find from the evidence, that the deceased had an opportunity to remain in the car until the train had come to a stop, and that he voluntarily and negligently abandoned his position in said train, and voluntarily and negligently took a position on the platform steps of the car, and maintained such position until the time of the injury, and if you should believe from the evidence that the plaintiff, before the accident, could have, by the exercise of ordinary care, remained standing inside of the car, and that he would have been safer there, then the plaintiff cannot recover, and you should find for the defendant.

VI.

“You are further instructed that the brakeman, or other servants of the defendant company, had a right to assume that the deceased would not attempt to alight before the train was stopped, and would not be guilty of negligence in failing [57] to warn him not to get off as he descended the steps.”

VII.

“In your deliberations, gentlemen of the jury, it is your duty not to allow yourselves to be swayed by passion, prejudice, or sympathy. The defendant company is entitled to the same fair and impartial treatment and consideration as if it were a private person, and you must not allow yourselves to be swayed in determining the merits of this case by any sympathy which you may have for plaintiff by reason of any damage which she may have suffered, if any, or by reason of her youth, or poverty, if such there be, or by reason of any belief that you may entertain as to the wealth or influence of the defendant, or by reason of the fact that it is a corporation and not a private person.

VIII.

“You are instructed, gentlemen of the jury, that the calling of a station by the brakeman, and the opening of a door of the car, is an invitation to the passenger to prepare to alight, but only after the train has stopped, and where a passenger is not thrown from a car by the negligent operation of the train, but he voluntarily attempts to alight before the train stops, and is killed, the carrier is not liable.”

6. The Court erred in giving, at the request of plaintiffs, the following instructions to the jury, and the giving of each of said instructions is here specified separately as error on the part of the Court, said instructions being originally numbered and reading as follows, to wit:

I.

“You are instructed that a railroad company is re-

quired to exercise the highest degree of care to secure the safety of its passengers, and is liable for the slightest negligence, if an [58] injury is caused thereby, and a carrier's duty is not ended by carrying a passenger safely from one point to another, but said carrier must set the passenger down safely at his destination, if in the exercise of the utmost care it can be done.

XI.

“In determining whether or not the defendant corporation exercised the greatest degree of care toward the deceased, Henry Murray, the jury should consider any and all directions or instructions which the jury may find were given to him by the brakeman on the train, and also all the acts and conduct of the brakeman in opening the vestibule doors and trap-door on the opposite side of the train from the station at Santa Margarita.

XIV.

“In determining whether or not the deceased, acting as a reasonable and prudent man was induced to believe by any words or acts upon the part of the brakeman, that the train was at a standstill, you are to consider Murray's familiarity or unfamiliarity with the location, the question of darkness, the sufficiency or insufficiency of lights, and any and all other conditions or circumstances surrounding his attempt to alight from the train.

XV.

“I instruct you that a passenger on a railroad train has a right to rely upon the instructions or directions given him in the form of words or actions on the part

of a brakeman, unless under the circumstances a reasonable and prudent man would not rely thereon."

7. The Court erred in giving, without being requested by either party, the following instructions to the jury, and the giving of each of said instructions is here specified separately as error on the part of the Court, said instructions being [59] numbered and reading as follows, to wit:

III.

"The Court instructs the jury that the degree of care required of a passenger is not the highest of care, but the ordinary care which ordinary prudent people are accustomed to exercise.

V.

"With the respect to the alleged negligence of the defendant relied upon by plaintiffs herein, I instruct you that the burden is on the plaintiffs to show the existence of such negligence by a preponderance of the evidence; With respect to the alleged contributory negligence of the deceased, Henry Murray, I charge you that the burden is on the defendant to show the existence of such contributory negligence, by a preponderance of the evidence.

"The first question for you to determine in this case is: was defendant, through its servants or agents, guilty of negligence as alleged by plaintiffs in their complaint: If you find and believe that defendant was not guilty of negligence as alleged in said complaint, your verdict will be for the defendant: If, however, you find and believe, from a preponderance of the evidence, that the defendant was

guilty of negligence as alleged in the complaint, then you will consider whether such negligence, so found by you, proximately caused the accident and injuries suffered by said Henry Murray: if you should find and believe that such negligence did not proximately cause the accident and injuries suffered by said Murray, then your verdict will be for the defendant: if, however, you should find and believe, from a preponderance of the evidence that such accident and injuries were proximately caused by the negligence of the defendant's agent, as alleged in the complaint, then you will determine whether or not said Henry Murray, as alleged in defendant's [60] answer, was guilty of contributory negligence i. e., negligence upon his part which contributed proximately to the accident and injuries suffered by him; if you find from a preponderance of the evidence that said Murray was guilty of negligence and that such negligence contributed proximately to the accident and injuries suffered by him, then you will find for the defendant; if, however, you do not find that said deceased was guilty of negligence as alleged in the answer, or if you do not find that any negligence committed by said deceased proximately contributed to the accident and injuries suffered by him, then your verdict will be for the plaintiffs.

“If, pursuant to the foregoing instructions you should find the verdict in favor of the plaintiffs, you will award them such damages as you find that they have suffered by reason of the death of said Henry Murray, not exceeding the amount prayed for in the complaint, to wit, fifty thousand dollars.

8. The Court erred in modifying the following instructions, requested by defendant to be given, for the reason that the modified instructions given by the Court did not properly present the law involved in said requested instructions:

II.

“You are instructed that the burden of proving the issue of negligence charged against the defendant rests upon the plaintiff, and that she has the affirmative of such issue, and that unless she proves such negligence by a preponderance of the whole evidence in this case, plaintiff can not recover; and that where the evidence is equally *balance*, or where you are unable to find from all the evidence that the preponderance is in favor of plaintiff, then your verdict must be for the defendant.

IV.

“You can not presume negligence on the part of the defendant [61] company from the mere fact of the death by accident of the deceased, but it is the duty of plaintiff to satisfy your minds by a preponderance of the evidence not only that defendant was guilty of negligence, but also that the negligence of defendant was the proximate cause of such death, and it is not sufficient for plaintiff’s case if the evidence offered upon this subject leaves the question of defendant’s negligence uncertain and in doubt, for you have no right to merely guess or conjecture from doubtful evidence among many nearly possible chances or causes that some act or omission of defendant might possibly render it responsible, if there is no satisfactory foundation in the evidence for such

guess or conjectural conclusion. It is the duty of the plaintiff to show by a preponderance of the evidence that defendant's negligence in fact contributed proximately to the accident and death of the deceased.

VI.

“If the accident causing the death of the deceased was such that it could not in the exercise of the respective degrees of care required by law have been foreseen either by the plaintiff or defendant, and occurred without negligence on the part of either, then your verdict must be for defendant.

X.

“You are further instructed that even should you find from the testimony that the acts and conduct of the brakeman of defendant amounted to an invitation or request to the deceased to alight, or that the train had stopped, the deceased would not thereby be absolved from the duty to use due care for his own protection, and if you should find that after such acts and conduct, the deceased repaired to the platform while the train was moving, and could have, by the exercise of ordinary care, [62] observed that the train was in motion, and without taking the necessary precaution to ascertain the speed at which the train was moving, stepped off and thereby received the injury complained of, he can not recover.

XI.

“It is admitted by the plaintiff in this case, gentlemen of the jury, and alleged in the complaint, that the defendant, the Southern Pacific Company, at the

time of the accident had furnished a platform where sufficient lights were provided and maintained by the defendant for the convenience and safety of the passengers alighting from said train, but that no lights of any kind or character were provided or maintained by said defendant at said station on the west side of said train; therefore you are instructed that the railway company, having provided a safe place for the convenience and safety of its passengers to alight, in the absence of any conduct on the part of defendant's brakeman, inducing in the deceased the belief that he could safely alight on the opposite side, it was the duty of the deceased, after having notice of the approach of the train, and if he voluntarily selected the opposite side, or the non-platform side, of the train, for alighting, and attempted to alight from said car while in motion, thereby receiving the injuries from which he dies, you should find for the defendant."

The above-named plaintiffs and their attorneys of record WILL FURTHER TAKE NOTICE that the defendant will bring said motion for a new trial, as hereinafter noticed, on for hearing before the above-entitled court, in the courtroom of department two, [63] in the Federal Building, in the city of Los Angeles, county of Los Angeles, State of California, on Monday, January 11, 1915, at the hour of ten-thirty in the forenoon of that day.

Dated this fourth day of January, 1915.

HENRY T. GAGE,
W. I. FOLEY and
W. I. GILBERT,
Attorneys for Defendant.

[Endorsed]: Original. No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, v. Southern Pacific Company, a Corporation, Defendant. Notice of Motion for New Trial. Received copy of the within notice this — day of Janyart, '15. Theodore A. Bell and M. K. Young, Attorneys for Plaintiff. Henry T. Gage, W. I. Foley and W. I. Gilbert, Attorneys for Defendant. Filed Jan. 6, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [64]

[Order Vacating and Setting Aside Judgment and Verdict and Granting Motion for a New Trial.]

At a stated term, to wit, the January Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-fourth day of May in the year of our Lord one thousand nine hundred and fifteen. Present: the Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 279—CIVIL S. D.

MARY MURRAY, et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant,

This cause having heretofore been submitted to the Court for its consideration and decision, on de-

fendant's motion for a new trial; the Court, having duly considered the same and being fully advised in the premises, now hands down its opinion, and it is by the Court ordered that the judgment heretofore entered herein be, and the same hereby is vacated and set aside, and it is further ordered that the verdict of the jury in this cause be, and the same hereby is set aside, and it is further ordered that defendant's motion for a new trial of this cause be and the same hereby is granted.

[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Copy Minute Order Granting Motion for New Trial. Filed Sep. 11, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [65]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

#279.

MARY MURRAY, and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendants,

Stipulation [as to Testimony and Evidence on New Trial, Motion for a Nonsuit, etc.].

WHEREAS a trial of the above-entitled action

was had in the above-entitled court on the 27th and 28th days of November, 1914, the Court sitting with a jury, and a verdict and judgment was therein rendered and entered, in favor of the plaintiffs, and against the defendant, in the sum of five thousand dollars; and

WHEREAS thereafter, upon motion of the defendant for a new trial in said cause, the said verdict and judgment was by the Court vacated and set aside; and

WHEREAS said cause had been set for trial in said Court on the 7th day of September, 1915, at the hour of ten o'clock in the forenoon; and

WHEREAS it is deemed convenient by the parties hereto to submit said cause to said Court, sitting without a jury, upon all of the testimony and evidence taken and heard therein upon the said previous trial in said court, for the purpose, among other things, of permitting the defendant to move for a nonsuit therein upon any grounds which may be designated in said motion;

Now, therefore, it is hereby stipulated by the parties hereto that at the time said cause is called for trial on September [66] 7th, 1915, at the hour of ten o'clock in the forenoon of that day, or at such time as the trial thereof may be continued by order of the Court or agreement of counsel herein, all of the testimony and evidence given and received upon the previous trial of said cause may be submitted to the Court, sitting without a jury, as fully and with like force and effect as though said testimony and evidence were actually given, admitted and heard

upon a trial of said cause; that upon the submission of said testimony and evidence the defendant shall move for a nonsuit and dismissal of said action, upon such grounds as the defendant may specify in said motion; and thereupon said motion for a nonsuit shall be heard and determined by the Court; provided, however, that nothing herein contained shall be so construed as to prevent or affect the right of either or any of the parties hereto to move for a new trial or to appeal from any order which may be made and entered upon the hearing and determination of said motion of nonsuit; and said order shall be deemed to be excepted to.

Dated August 26, 1915.

THEODORE A. BELL,
MILTON K. YOUNG,
Attorneys for Plaintiffs.
HENRY T. GAGE and
W. I. GILBERT,
Attorneys for Defendant.

[Endorsed]: No. 279—Civil. In the District Court of the United States, in and for the Southern District of California. Mary Murray, et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Stipulation. Filed Sep. 7, 1915. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. [67]

*In the District Court of the United States in and for
the Southern District of California, Southern
Division.*

No. 279—CIVIL — Dept. 2.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Defendant's Motion for Nonsuit.

Now comes the defendant, Southern Pacific Company, and moves the Court for a nonsuit; First, for the reason that the testimony offered is insufficient in law to establish a cause of action in favor of the plaintiffs and against the defendant company; second, for the further reason that the testimony offered fails to develop any act of negligence on the part of the defendant company for which the accident complained of resulted; third, for the reason that if negligence on the part of the defendant company has been shown as matter of law or fact in the opening of the door, then the deceased himself contributed to the injury by attempting to alight from the train while it was moving, as shown by the plaintiffs' testimony, at the rate of ten or twelve miles an hour; and, fourth, for the further reason that the deceased having seen fit to alight from the train on the nonplatform side, while the train was

in motion assumed the risks which were incidental to his attempt to alight.

HENRY T. GAGE and
W. I. GILBERT,
Attorneys for Defendant.

[Endorsed]: Original. No. 279—Civil. In the United States District Court, Southern District of California, Southern Division. Mary Murray, et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Motion for Nonsuit. Filed Sep. 7, 1915. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. Henry T. Gage and W. I. Gilbert, 1208-10 Merchants Natl. Bank Bldg. Sixth and Spring Streets, Los Angeles, Cal. Attorneys for Defendant. [68]

[Order Granting Motion for a Nonsuit, etc.]

At a stated term, to wit, the July term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the seventh day of September, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 279—CIVIL, S. D.

MARY MURRAY, et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

This cause coming on this day to be heard by consent on defendant's motion for a nonsuit; Milton K. Young, Esq., appearing as counsel for plaintiffs; W. I. Gilbert, Esq., appearing as counsel for defendant; and counsel for plaintiffs having offered all the evidence given and admitted on the former trial of this cause and having rested; and said motion for a nonsuit having thereupon been argued, in support thereof, by W. I. Gilbert, Esq., of counsel for defendant, and in opposition thereto by Milton K. Young, Esq., of counsel for plaintiffs; and this cause having been submitted to the Court for its consideration and decision on defendant's said motion for a nonsuit and the argument thereof, it is now by the Court ordered that defendant's motion for a nonsuit in the cause be, and the same hereby is granted; and it having been stipulated that the transcript of evidence and proceedings on the former trial may be taken as [69] the record herein; thereupon, on motion of Milton K. Young, Esq., of counsel for plaintiffs, and by consent of W. I. Gilbert, Esq., of counsel for defendant, it is ordered that plaintiffs herein may have sixty days from this date within which to present a motion for a new trial and the record of the evidence.

[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Copy Minute Order Granting Motion for Nonsuit. Filed Sep. 11, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [70]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

No. 279—CIV.

MARY MURRAY and LENA MURRAY, a Minor,
by MARY MURRAY, Her Guardian *ad Litem*,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Judgment [on New Trial].

This cause coming on regularly on Tuesday, the 7th day of September, 1915, being a day in the July term, A. D., 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, to be tried before the Court and a jury to be impanelled; Milton K. Young, Esq., appearing as counsel for the plaintiffs; W. I. Gilbert, Esq., appearing as counsel for the defendant; and counsel for the respective parties hereto having stipulated in open court that the testimony taken at the former trial of this cause may be considered as the testimony upon this trial; and defendant having thereupon filed a motion for nonsuit; and the Court, after hearing argument of respective counsel on said motion for nonsuit, having ordered that said motion be granted;

NOW, THEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is considered by the court that Mary [71] Murray and Lena Murray, by Mary Murray, her Guardian *ad Litem*,

Plaintiffs herein, take nothing by this, their action, and that the Southern Pacific Company, Defendant herein, go hereof without day, and that said defendant do have and recover of and from said plaintiffs its, said defendant's costs herein, taxed at \$——.

JUDGMENT ENTERED SEPTEMBER 11,
1915.

WM. M. VAN DYKE,
Clerk.

By T. F. Green,
Deputy Clerk.

[Endorsed]: No. 279—Civil. United States District Court, Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. The Southern Pacific Company, Defendant. Copy of Judgment. Filed Sep. 11, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.
[72]

**[Certificate of Clerk U. S. District Court to
Judgment-roll (on New Trial).]**

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 279—CIVIL.

MARY MURRAY and LENA MURRAY, a Minor
by MARY MURRAY, her Guardian *ad Li-*
tem,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

I, Wm. Van Dyke, clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the judgment made and entered in said action, and recorded in Judgment-book No. 2 thereof, for the Southern Division, at Page 314 thereof; and I do further certify that the papers hereto annexed constitute the judgment-roll in said action.

Attest my hand and the seal of said District Court, this 11th day of September, A. D. 1915.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk. [73]

Endorsed]: No. 279—Civil. In the District Court of the United States for the Southern District of California, Southern Division. Mary Murray, et al., etc., Plaintiffs, vs. Southern Pacific Co., a corporation. Judgment-roll. Filed Sept. 11, 1915. Wm. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Recorded Judg. Register Book No. 2 page 314. [74]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

MARY MURRAY, and LENA MURRAY, a Minor,
by her guardian *ad Litem*, MARY MURRAY,
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

This cause came on regularly for trial before the Court on the 7th day of September, 1915, Theodore A. Bell and Milton K. Young appearing as attorneys for the plaintiffs, and Henry T. Gage and W. I. Gilbert appearing as attorneys for the defendant. In pursuance of the stipulation entered into between the parties, hereinafter set forth, the plaintiffs introduced all the testimony and evidence given at the former trial of said cause, before the Court and Jury, on the 27th and 28th days of November, 1914, and the plaintiffs thereupon submitted said cause upon said testimony and evidence so introduced. Whereupon the defendant presented its motion for nonsuit hereinafter set forth at the end of the testimony, which motion the Court granted, and ordered a judgment of nonsuit, to which order and judgment the plaintiffs duly excepted. The testimony submitted to the court upon which said motion for nonsuit was granted is as follows, to wit: [75]

**[Testimony of William Thomas Moran, for
Plaintiff.]**

Direct Examination

(By MR. BELL.)

My name is William Thomas Moran, age 37, residence San Francisco, occupation police officer in service nearly ten years. Am now on the Board of Identification of the police department. Was acquainted with Henry Murray, he is now dead, Have known him about four years; we were good friends; knew his wife and daughter. Left with Murray on evening of May 30, 1913, going to Santa Margarita, arriving there about eleven o'clock at night. We were seated near the front of the smoking-car on the left-hand side. When the brakeman went through, Murray said: "I think I know that fellow, and I know his father." Quite a long while after that, Murray got up and spoke to the brakeman, and when he came back he told me that that was the fellow, that he knew his father well. Afterwards as the brakeman came into the car, they talked together. I noticed the brakeman was usually getting off at each station at that end of the smoker, and he spoke to him therefore some time, and Murray told him his business down there, where we were going—that we were going down to see some land, and he had sent a wagon and some stuff down there to a man in the Santa Margarita Hotel, and I don't know just exactly what started the conversation in regard to that, but neither of us had been down there before, and I believe Murray asked

(Testimony of William Thomas Moran.)

him if he knew where the Santa Margarita Hotel was, and I am not positive whether he asked him or not, but I was not paying much attention to the conversation until Mulville says: "The Santa Margarita Hotel is on the opposite side of the station. That station is on the left side and the [76] Santa Margarita Hotel is on the right-hand side, and when we get there I will show you where to get off." So that was about all of the conversation I paid attention to there, for that was all I was interested in. They talked about men known to both. I did not pay much attention to that; I was reading the papers, and one thing or another. As we came into Santa Margarita, of course, we knew it was the station Santa Margarita. The whistle blew, and very soon afterwards Mulville came in from the rear of the smoker and came down and called and beckoned to us and says: "This is where you fellows get off." We went back to the rear end of the smoker, and Murray was first and I followed him, the brakeman was ahead of Murray. He opened up the gate, the trap, and the door, on the forward end of the coach immediately behind the smoker, or at the rear end of the smoking-car, as we have reference to, and he pointed out and said, "There is your hotel up there," and he left at once and went to the front end of the smoking-car. Murray started down the steps, and the train was slowing down, and in fact it was just gliding along, and I was going down after him, but I knew that he was very close to the bottom—must have been on the last step, and

(Testimony of William Thomas Moran.)

I happened to glance up and saw the light from the car windows out on the ground, and I saw we were going quite fast, a great deal faster than I ever thought we were going, and Murray at the same time made an effort to step or get off or something and I called to him and it was too late, he was over-balanced, and he went off. He had a grip in his left hand, and had hold of the hand-hold on the right-hand side. He went to go off, and as I called to him of course his grip came down and he would let it rest on the step and then pick it up, and he raised his foot to go off and [77] he started straight back and the grip swung out and his left hand swung around and he just went as quick as that (snapping fingers); he was gone. His back was toward the engine when he fell. When the brakeman pointed out to him and said "There is your hotel," I was immediately back of Murray. We were all pretty well crowded on the platform there. The brakeman was down the steps a ways, and he had to stoop down to point to it, when we were coming in to it. We hadn't got abreast of it, I saw lights, but I couldn't distinguish to which one he was pointing to. It was dark, you couldn't see a thing there. It was very dark, excepting where the lights of the train—where I was the light shone there from the smoker I came out of, and also the lights from the coach behind was showing through, and there was a porter or somebody standing just inside the door of that coach, and that door was open. It was too dark to see the ground im-

(Testimony of William Thomas Moran.)

mediately below the step. The only reason why I knew that Murray was making a mistake was because I got a glimpse of the ground from the lights of the car windows down below, the way it would shine out below.

Q. And by that means you knew the train was still moving?

A. Oh, yes, I saw then it was going much faster than—over on the street there were lights, but the street is a considerable distance from the car tracks. I believe they are coal-oil or gas-lights. They were very dim; they did not flash on the ground; there was no light immediately in front of the steps when he stepped off—absolutely. The brakeman pulled up the trap-door first and swung that back, then he opened the door, the outside door of the car, he was in a hurry at the time. He immediately left. After I saw Murray disappear, I went down the steps and got off and ran back along until I found him. I called to him several times, but I found him lying alongside of the track. [78] He was unconscious. I went across the lots and brought a doctor, and when I got back the doctor was there and someone else, and we took Murray—the doctor was there and he examined him and he had an awful hole in the back of his head. We put him on the stretcher and put him in the observation car and brought him to San Luis Obispo. There was an ambulance waiting for us there, and we took him to a sanitarium there. He lived about three hours. When we got to the sanitarium, I went to the station and telegraphed, and then went

(Testimony of William Thomas Moran.)

back again. He did not recover consciousness. At the time Murray got off the trap-doors and vestibule doors on the right-hand side of the train were closed. I do not know if they were opened at all. The train had not come to a standstill when I got off. Up to that time the doors on the station side between the smoker and first coach had not been opened, to my knowledge. They were not opened at the time Murray started to descend. Murray was a large man, five feet eleven inches high, and weighed about 230 pounds, a great big, strapping man—I have a picture of him here that I took the summer before. (Picture marked Plaintiff's Exhibit 1.) He told me he was 38. His health was first-class. I saw him several times daily. He was a great, big, husky, jovial fellow, a fine-looking man. He employed two men in his business—grocery and saloon. The bar room was on California Avenue and the grocery on Powell Avenue. It was a thickly settled community in the Mission district. I always believed he had a good business. We occupied no other car during the trip but the smoking-car. It was Memorial Day and we had excursion rate tickets. It was a solid vestibule train, as far as I know. It was vestibuled between the smoking-car and the first coach back. There was no platform provided for passengers alighting where Murray attempted to alight, the ground was just the same as you will get along any railroad track where they [79] haven't made provisions for passengers to get off—just like anywhere along the

(Testimony of William Thomas Moran.)

last fifty miles back. I don't remember whether I next saw the brakeman when we were putting the body into the car, or putting Murray into the car, or in the telegraph office, but I am inclined to believe it was around when I was sending the first telegram, after the body had been put on the train. I assisted in that. Conductor Spear, the doctor and the porter assisted. The porter, or waiter, I don't know which, was standing in the coach following the smoker, just inside the door, when Murray started to descend. When Murray went off, I says, "He is off." And then he stepped out and it was he that notified the trainmen. The conductor or any brakeman was not around then. The colored porter said nothing to Murray as he started to descend. It was quite a long way before we got to Santa Margarita—about half-past nine, or ten, fully an hour before we got there that Murray and Mulville were talking together when the brakeman said that the Hotel Santa Margarita was on the opposite side from the station. Then when the brakeman came into the smoking-car and beckoned to Murray, he says, "This is where you fellows get off." He then turned and went to the back platform, and Murray and I followed him. Murray was standing as close to the step there as he could, when the brakeman said, "There is your hotel up there." I was standing about on the bumpers, just between the cars, or perhaps a little bit over on that car that followed the smoking-car. The brakeman was down on the steps. He pointed up because we hadn't

(Testimony of William Thomas Moran.)

got up there yet. He leaned out and pointed up to the hotel, where we could see the lights of the hotel.

He says, "There is your hotel." The brakeman then got out, he was in a hurry. That is all the conversation I heard on the platform by anyone.

[80]

Cross-examination.

(By Mr. GILBERT.)

We left San Francisco at eight o'clock in the evening. The accident happened twenty minutes after eleven. About an hour before we reached Santa Margarita, I don't know whether Murray asked the brakeman or whether he volunteered the information in regard to where the Hotel Santa Margarita was situated. The brakeman told Murray. He said it was on the opposite side of the track from the depot. He advised Mr. Murray at that time that the hotel was on the opposite side of the railroad from the station. Before we reached the station he pointed out the hotel, on the opposite side of the station, saying "There is your hotel." Then he turned and walked away after he opened the vestibule door. He didn't say anything about getting off, which side we should get off on, while we were on the platform. Just opened the door and walked away. Murray then descended the steps with his grip in his left hand. He had hold of the hand-hold with his right hand. He did not turn his back to the engine while he was on the car. When he went out hanging onto this thing it swung him with his back to the engine. The train was going perhaps twelve miles an hour,

(Testimony of William Thomas Moran.)

perhaps more; I could not tell. I happened to look out. I was standing back from the steps, and I had to glance up that way to where the light was cast out of the car windows, and there I saw the ground. I saw Murray step off, he stepped like he thought there was another step or the ground. I think the train was going 12 miles an hour, fully that. He heard my warning and tried to recover himself. I was standing behind him. As soon as I saw the rapidity with which the train was moving, I saw it was dangerous, and I knew it wouldn't do for him to attempt to alight and I called to him. He tried his best to recover himself, but he could not get back. The train [81] ran about seven coaches from where he got off. I do not know anything when they opened that vestibule door; the one on the station side. It was not open when I was talking with Murray at the top of the stairs. We had not then reached the station yet. I do not know whether it was open when we reached the station. I have not been to Santa Margarita since the date of the accident. The Santa Margarita Hotel, is, I should judge, about between 300 and 350 feet—or perhaps 400 feet North, then West—from the line directly North—about 150 or 200 feet. The train traveled about 350 or 400 feet after Murray stepped off. He could see out, if he wasn't trying to see where he was stepping. I don't know how that looked to him from that position, I could not say down there.

(Testimony of William Thomas Moran.)

Redirect Examination.

(By Mr. BELL.)

The hotel is about 400 feet directly north, then west 150 or 200 feet. Murray fell about opposite the hotel, very nearly opposite the hotel.

(By Mr. GILBERT.)

Just opposite the hotel is where he started to get off, to save that walk.

(By Mr. BELL.)

We were getting off opposite the hotel because that is why we were directed to get off by the brakeman. That is the reason we went out that way, was to get to the hotel. We went out there because of the language and actions of the brakeman.

Q. And you went out there and started to get off because of the language and actions of the brakeman? A. Yes.

By Mr. GILBERT.—We move to strike that out as leading and suggesting, and a conclusion of the witness. [82]

Mr. BELL.—That is only summarizing what the witness testified to.

Mr. GILBERT.—We object to the summary, then.
(Discussion, and last question read.)

Q. (By Mr. BELL.) Now, instead of asking you in that from I will ask you again why did you and Mr. Murray leave that smoking-car, go to the platform and attempt to get off at that place?

Mr. GILBERT.—Objected to as improper and calling for a conclusion of the witness. Let him state what was said and the jury will then deter-

(Testimony of William Thomas Moran.)

mine why they went back and this man got off the train before it stopped.

Mr. BELL.—The trouble is you invited this very thing by your cross-examination, which assumed that he wanted to save time, and asked a question that contained two questions—"You got off there to save time"?

Mr. GILBERT.—I think the question asked was perfectly legitimate.

Mr. BELL.—Well, I will ask the witness to explain that answer.

Q. (By Mr. BELL.) You were asked by counsel on cross-examination if you started to get off on that side for the purpose of saving time, to which you answered, yes. Now, I will ask you to go on and further explain if you got off for any other reasons and what reasons and why.

A. I don't—Did I answer that question yes, that we got off to save time?

Q. You did, yes.

A. Well, I don't know as—what other reason we could possibly have got off there for. You understand we were in a town where neither of us had ever been before, and of course we wanted to—

Mr. GILBERT.—We object to voluntary statements and arguments on the part of the witness.

Mr. BELL.—No, I think that is explanatory.

The COURT.—Yes, proceed. [83]

A. (Continuing.) As I say, we had never been in the town before, neither one of us, and, and the brakeman had offered to show us where to get off,

(Testimony of William Thomas Moran.)

and whether you want to put it for saving time, or whatever the motive was, it doesn't make any difference to me. That is where we were to get off and go to the hotel.

The COURT.—The question is not whether it makes any difference to you; the question is what was your reason for getting off at that particular place.

A. Because we were directed to do so by the brakeman.

Q. (By Mr. BELL.) Was that the only reason?

A. Yes.

Q. (By Mr. GILBERT.) What did the brakeman say to you when he told you to get off while the train was in motion? Give us his words.

A. He came into the car at that time and says, "This is where you fellows get off," and beckoned us back and turned to the back end of the smoking-car and opened the trap-door.

Q. And says, "There is your hotel"?

A. And pointed out and says, "There is the hotel."

Q. What did he say to you about getting off when the train was going twelve miles an hour?

A. Absolutely nothing.

Q. What did he say to you about getting off and going to the hotel? A. Nothing.

Q. What did he say to you about anything except to point you out the hotel?

A. Nothing on the platform.

[Testimony of A. B. Spear, for Plaintiff.]

Direct Examination

(By Mr. BELL.)

My name is A. B. Spear; I reside in San Francisco; I am a [84] railroad conductor in the employ of the Southern Pacific Company, in service about nineteen years, fourteen years a passenger conductor. I was conductor on the train leaving San Francisco in the evening of May 30, 1913, going to San Jose, Santa Margarita, and San Luis Obispo and other points south. This was No. 10, usually called the Sunset Express. E. Mulville was head brakeman. He had been on the run quite a while. I had known him perhaps two years before that time. There is a book of rules governing the operation of all trains. (Witness identifies book of rules, revised edition of August 1, 1907.)

Q. Are you acquainted with rule No. 750?

A. Yes, sir. (Examining book.)

Q. Will you read that rule?

Mr. GILBERT.—That is objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in the cause, no proof having been offered that the injured party was aware of the rule at the time of the alleged accident, no foundation having yet been laid for the introduction of testimony relative to the rule.

The COURT.—In what respect do you mean no foundation has been laid.

Mr. GILBERT.—As to knowledge on the part of the injured party relative to the operation of the

(Testimony of A. B. Spear.)

train and the rules governing its operation.

The COURT.—Let me see the rules. Which one is it, Mr. Bell?

Mr. BELL.—Rule No. 750. I will state to the Court that there are three rules contained in this book which we believe are material to the issue in this case. I will refer the Court and counsel to rule 816 and rule No. 837, and also to the general notice contained on the first page of the rules.

The COURT.—What is your theory, Mr. Bell—that the nonobservance [85] of these rules is in itself negligence *per se*?

Mr. BELL.—No, your Honor, we make no claim of that character. We appreciate the fact that in the case of violation of ordinances a violation of an ordinance would constitute negligence *per se* because made by public authority; but we offer these rules for the purpose of showing, of course, a violation of the rule upon the part of the brakeman—rules that are promulgated for the safety of passengers, as stated in the front page of the rule: “Obedience to the rules is essential to the safety of passengers and employees as to the protection of property”; and we make the claim that the violation of a rule that is laid down for the government of conductors and brakemen in the discharge of their duties toward the public is a circumstance which may be considered with other circumstances in the case going to show negligence upon the part of the defendant corporation, and particularly explanatory of the actions of the brakeman in his conduct toward this particular passenger.

(Testimony of A. B. Spear.)

The COURT.—I would suppose that it would be the act itself which would speak, either by way of negligence or otherwise of the agent or defendant and that the fact that he was or was not obeying a particular rule would be beside the question to be determined by the jury.

Mr. BELL.—I do not believe the rules are conclusive evidence of negligence; I believe rules can be broken by the railroad employees and still it might not be a case of negligence; but I believe it to be a circumstance as throwing light on that situation. As we claim, the brakeman came in and invited Mr. Murray to alight, opened the vestibule doors before the train stopped, in violation of the rule that declares that he should not open them until the train came to a standstill. He pulled [86] up the trap-door, didn't open the doors on the station side at all, leaving Mr. Murray's only alternative to go out in the manner that he did, and it seems to me that it certainly cannot be of injury to the defendant corporation to prove the existence of these rules, and certainly it must assist the jury in taking that entire situation into consideration to determine whose negligence was the proximate cause of the injury.

Mr. GILBERT.—For the purpose of the record, may I inquire of counsel, does he make the statement that the door on the station side was not opened?

Mr. BELL.—We expect to show that by the proof. (Discussion.) If the Court will permit, I will with-

(Testimony of A. B. Spear.)

draw the presentation of these rules at this time, and then if, during the trial of the case, a situation should develop that we believe the rules are competent under the views of the Court, we will ask leave to present the question again.

The COURT.—Very well, it may be withdrawn, then, without prejudice.

Mr. BELL.—That is all.

Mr. GILBERT.—That is all.

[Testimony of Mary Murray, for Plaintiff.]

Direct Examination.

(By Mr. BELL.)

My name is Mary Murray; I live at San Francisco. and am the widow of Henry Murray. We were married January 6, 1900. I have one child living, two dead. The name of the living child is Lena Murray. I was born and raised in San Francisco. My husband was thirty-three years of age—no, forty-three. He had a grocery and bar business. The family lived upstairs. He had two young boys to assist him; they boarded and lodged with me. We were in that business about 12 years. He owned that a short time before our marriage. We lived there all our married [87] life. Mr. Murray was very healthy, strong and good-natured. He was a very kind, loving, and a good husband. He properly provided for us every comfort and convenience, and clothed and sent the little girl to school. She went to the Mission school near where we lived, in the Mission district. His profit was about \$100.00 a month, after paying all help and other expenses.

(Testimony of Mary Murray.)

He had no other business or income. I am 39 years of age. Lena will be 12 on April 18, 1915. We are now living with my mother in San Francisco.

No cross-examination.

[Testimony of Lena Murray, for Plaintiff.]

Direct Examination.

By Mr. BELL.—She is under twelve, if the Court please; perhaps the Court might want to examine her.

Mr. GILBERT.—I raise no question, your Honor.

Witness, examined by the Court, testified that she is 11 years of age, will be 12 the 18th of April, 1915; that she is in the high fourth grade at school, where she has been attending since she was six years of age; that she knows what it means to take an oath to tell the truth and nothing but the truth, and that she has never before been a witness. Thereupon the Court pronounced her competent to testify as a witness in this case.

My name is Henrietta Lena Murray. I live at 276 Paige Street, San Francisco. I am 11 years of age. I remember the day papa left home to make a trip with Mr. Moran. I think it was Decoration Day. I put a piece of red, white and blue ribbon in his buttonhole, because it was Decoration Day. I can remember him from about the time I was six years of age. He was always very good to me. On Sundays when I went to church, he would give [88] me money for the poor box, and a nickel for myself. He would give me money at other times, and every Saturday he would give me money. He

(Testimony of Lena Murray.)

always took me on his knee when he came home for supper or dinner, and kissed me and sang for me. He did not go away from home often. During the day I would go to the grocery store and stay with him, and run errands after school. I would run around and get the orders for groceries and provisions and things of that kind. He had over 100 customers; I saw so many of them. I went down to the car with him the day he left. I never saw him again until after the accident.

Mr. GILBERT.—No cross-examination.

Mr. BELL.—Plaintiff rests.

[Testimony of Edward Mulville, for Defendant.]

The defendant then proceeded to offer its evidence, EDWARD MULVILLE, witness for defendant.

Direct Examination.

(By Mr. GILBERT.)

My name is Edward Mulville. I am a railroad brakeman. I remember the occasion of Henry Murray's being injured on May 31, 1913. I was a brakeman on that train, having been in service eleven years. Train left San Francisco that evening at four o'clock. I saw him coming on the train at San Francisco. Could not say who was with him; recognized him by his Panama hat. Do not remember seeing him again until after train left Gonzales at eleven o'clock that evening; he came forward and said: "Why, I know you, don't I?" to which I replied, "Why, certainly," mentioning his name. I recognized his voice. Had not seen him for about seven years, and he had grown a good deal stouter.

(Testimony of Edward Mulville.)

He asked me how long I had been in the service, to which I replied about ten years. I then excused myself, saying that I had not yet been to supper, and went back to the dining-car. After [89] leaving Colburn, while he and Mr. Moran, his companion, were playing cribbage, I went up and talked to him for a while. We spoke about some of the old employees. I then called out Kings City Station, and upon coming back he said: "Well, I would like to see this country during the daytime." I said, "How far are you going"? and he said, "To Santa Margarita." I said, "You can see that all right; I will let you know later on." He was on the station platform at Paso Robles. Going into Santa Margarita, after the station whistle had been sounded by the engineer, I went through the chair-car and twice announced the station, came out of the chair-car, opened the vestibules on the station side, went into the smoker, called out "next station is Santa Margarita," advanced to the middle of the car, called out "Santa Margarita" again—my intention was to go to the forward part of the smoking-car. Mr. Murray was standing clear of the aisle in the center of the car, on the right-hand side, and he said, "Good-night, Ed." I said, "Here, this is where you get off; you can get out here in the morning on train 231 at 7:28." That was in answer to his question some time previous when he wanted to know what would be a good train to get out on in order that he could see the country during the daytime. He then asked me, "Where is the Santa Margarita

(Testimony of Edward Mulville.)

Hotel?" He was then standing on the right-hand side I said, "The Santa Margarita Hotel is on this side and the station is on this." He said, "Do you think the dining-room would be open so that I could get something to eat?" I said, "Why, I don't know; it is pretty late." "Gee!" he said, "I am hungry; I would like to get something to eat." I said, "Well, you might find an enchilada parlor open, or something of that kind." [90]

When I called the station first, Mr. Moran was sitting on the left-hand side. He stepped right up and took a suitcase and put it in the middle of the aisle and started to adjust the straps on it. When he heard Mr. Murray ask me these questions, he arose immediately and he was listening to the conversation. After I told him about the enchilada parlors, I said, "Now you will have to wait, because we stop here a little while, say about ten minutes, and we take water, and also pick up a helper." He said, "Well, can't you let me over there right away?" I said, "No, the station is on that side, and that is the side you will have to alight on." He said, "I am awfully hungry." I said, "Didn't you have anything to eat in the dining-car?" He said, "No, I didn't have a thing to eat since I left San Francisco." We were almost getting to the station then, and I didn't have time to go to the head end of the car, but I went toward the head end of the car and turned around and came back to Murray, and said, "Here, I will tell you what I will do. At this station, on account of picking up a helper, I will open

(Testimony of Edward Mulville.)

the trap and then when the train stops you can cross over, and when it does stop it will be almost directly opposite the hotel." I went back and I opened the vestibule, and I was standing there, and Mr. Murray came along. He did not have his suitcase when I saw him, but he brought it with him, and it was lying next to him. I opened this vestibule. I did not point out the hotel, because I couldn't, we hadn't arrived to it yet. I said, "Do you see the lights over there? That is Santa Margarita." And he was inside the car at all times, leaning against the door, and he pulls his head around and looks over. We had three passengers to get off at that point, and one of them was in the forward car, the smoking-car. I looked forward and the man was reclining something in this manner, as [91] though he had went to sleep, so I went into the car and went up to him and called out, "Santa Margarita," and he turned his head and I looked back and by that time Mr. Moran was standing in the vestibule—not in the vestibule, but clear of the vestibule, inside of the car, close to the door. Then I went and opened the vestibule door on the station side, and just as I got the vestibule open the train came to a standstill, and I looked back and Mr. Murray was still on the inside of the car, and at no time was he out in the vestibule while I had any kind of a conversation. I coupled on the helper, then I crossed over the—the helper was on the siding opposite the station side. I got on the head-end of it, brought it out on the main line, backed down, coupled on to the train, and was in the

(Testimony of Edward Mulville.)

act of coupling the hose when the porter comes in and says, "Get a stretcher." I says, "What do you want a stretcher for"? and he says, "That friend of yours fell off the train, and we think he is killed." So I went to the baggage-car and got a stretcher and took it back and while they were putting him on there I went up ahead and got the emergency box. The last time I saw Murray and his friend they were standing on the end of the smoker; Murray was leaning up against the open door of the smoker and Moran was standing opposite; both were inside of the car. I opened the vestibule door for the purpose of going over and getting my helper; not so much for getting off there, but for getting on after I coupled the helper on. The helper and everything is there for the purpose of coupling up, and in order to do that, that side is opposite the station, and wherever that is an interference with the main line, wherever there is a grade or anything of that kind, the rules require to run the air test made by the engineer, after the train assumed a speed of six miles an hour. We are required [92] to keep trespassers off trains, and at all these watering stations, especially Santa Margarita, at different times there are trespassers—in other words, hoboes. There are usually from ten to eleven there. My reason for opening the door was to get on that side, because I generally ride the tender out of the station, and then the speed is picking up I drop off the train and catch that side. I boarded the train while it was in motion.

(Testimony of Edward Mulville.)

Q. Did you at any time invite or suggest to Mr. Murray that he alight on the right-hand side of the train?

A. No, sir, I never suggested anything of the kind, for him to alight on that side.

Q. Did you advise him that the vestibule doors would be opened on the station side? A. I did.

Q. Did you open them on the station side?

A. I did. At the time I opened that vestibule door, we were traveling not more than twelve miles an hour; that is my judgment.

Cross-examination.

(By Mr. BELL.)

I opened the vestibule doors on the rear of the smoker on the station side going into Santa Margarita station; before I arrived at the station; I was clear of the westbound switch. The vestibules of the station side door were open before I saw Mr. Murray at all; before I announced Santa Margarita in the smoking-car; the train was still in motion preparatory to making the station stop; going about twelve miles an hour, when I opened the vestibules on one side. Afterwards I opened them on the right-hand side towards the hotel, when I saw I couldn't make the smoker; [93] when I opened the vestibule on the hotel side we were not going twelve miles an hour; we were less than that. I had already opened the vestibule on the station side, before I opened them on the other side. After opening the vestibule doors on the station side, I went into the smoker to announce the station. Mr. Murray was

(Testimony of Edward Mulville.)

already standing; Mr. Moran was sitting on the left-hand side, and he immediately got up and got his suitcase. I went right up in the middle of the car, and called again, and was talking with Mr. Murray. I then went back again when I saw I couldn't make the head end, because we were going too slow—the speed was being reduced all the time. Wanted to get to the head end of the smoker. I went on back when I saw I couldn't make it. They did not follow me directly. I had already had the vestibule door open; the vestibule door—I just opened the vestibule door on the hotel side when Mr. Murray came up there. I says, "See the lights over there? That is Santa Margarita." Apparently he followed up very closely to me. It took about twenty seconds or something like that to open the vestibule doors on the hotel side. By the time I got it open, he evidently followed me—he wasn't close to me, he was standing right inside of the car. He didn't come out on the platform at all; neither he nor Mr. Moran came out on the platform when I opened that door. I then squeezed by Mr. Murray. He was standing up against the door. He was rather stout.

Q. How fast was that train going when you opened the vestibule doors on the station side?

A. About twelve miles.

Q. Were you not violating a rule of the company?

A. I don't know that I was.

Q. Were you not violating Rule No. 837 when you opened those vestibule doors before the train came to a standstill? .[94]

(Testimony of Edward Mulville.)

We were all inside the station limits. I was not violating the rule. I can recite it—that trap-doors inside those vestibules must be kept closed while the train is in motion. I opened those vestibule doors on the station side while the train was going about twelve miles an hour and they were open until the train came to a standstill at the station. The third passenger walked back towards the rear *or* the smoking-car and got off the rear end of the smoking-car. I did not see him get off. He got off, because he wasn't on there when we went on. I do not know whether he passed on through to another coach or not. He could not get off farther back, because there were no doors open farther back on either side. Those were the only doors open on the station side. The chair-car was next to the smoker, and where Murray got off was the only place at that time where doors were open. I testified before the coroner at San Luis Obispo. There was but one vestibule door open on the opposite side and three on the station side. The one on the opposite side was the one where Mr. Murray went out. Those doors right at that point—I don't know anything about any doors being open farther back on the train. I did not open the vestibule on the opposite side of the train on the front end of the smoker. (Portion of testimony before the coroner read as follows.)

Q. "A. Yes, sir, I looked out first, it is a passing track there and I looked out to make sure. Q. Do you know, Mr. Mulville, whether there were any other of the vestibule doors on that train open, on

(Testimony of Edward Mulville.)

that side of the train? A. There was one on the head end of the smoker, just as we got into Santa Margarita. I opened it to get off on that side to get the helper in." Did you so testify. A. No, sir, I did not. [95]

Q. I will read a little further: "Q. In other words, merely two vestibule doors, one on the front and one on the rear end of the smoker were the only vestibule doors that were open on the side opposite from the depot at Santa Margarita? A. Yes, that is, on the engineer's side." That is your answer. "Q. That was done at Mr. Murray's request—as a matter of accommodation to Mr. Murray? A. At his request and as a matter of accommodation." Now, I ask you did you open that vestibule door at the rear end of that smoker, on the wrong side of the train, for your own accommodation or for the accommodation of Henry Murray? A. For my own accommodation.

Q. Why did you testify, then, at the coroner's inquest if you did testify—?

A. I will say candidly that I don't remember testifying to that question. I don't remember the question being asked or answering it. And furthermore, regarding the question by Mr. Kaetzel, I don't remember him asking that question. It was the coroner asked it. He says, "Were there any other doors open on the opposite side"? I says, "No, sir." Then he says, "There was but one door open on that side?" I says, "Yes, sir."

Mr. BELL.—Have you a certified copy of the cor-

(Testimony of Edward Mulville.)

owner's inquest here?

Mr. GILBERT.—No.

Q. (By Mr. BELL.) Then you didn't so testify?

A. No, sir, I didn't so testify. I opened the trap-door on the vestibule for my own accommodation, and not for the accommodation of Henry Murray.

Q. I will ask you if you didn't testify as follows:

“Q. The vestibule doors of the rear cars? A. Yes, sir, that was done after we left the west switch.

Q. You do that as you are coming [96] into the station? A. Yes, I was doing it as we—were coming into Santa Margarita. When I met Mr. Murray in the smoker, I was pressed for time to get to the head end and I went right back and done it, and the last I see of him he was standing in the door of the smoker at the rear end, and I had to squeeze myself by, he was a man of large proportions and I was going to say something in a joshing manner, but I left him there, I didn't have time to talk. Q. The right of way was clear? A. Yes, sir, I looked out at first, it is a passing track there and I looked out to make sure.” Was there a passing track there where Mr. Murray got off?

A. There is a siding there on that side; the siding is on that side. I looked out there to make sure that there was no train in there because after telling him the conditions that I was working under there, I told him he could get off—after telling him he would have to get off at the station side, that he could cross over, if there was a train there I could have told him there was one there, and he would have to

(Testimony of Edward Mulville.)

wait any way. I looked out to see if the track was clear, on my own account. If there was any train in there, I wouldn't have to get off on that side for the simple reason that the helper would be on the house track; I would then go over on the house track. I looked out partly for Mr. Murray. If there was a train there I could have told him. I told him when the train stopped the rear end of the smoking-car would be almost directly in front of the hotel. I did not tell him anything about crossing over the right of way; I said he could go over the right of way; he would have to cross over the right of way to get there. I didn't say anything about crossing over the right of way at all; I said he could get there right away, without having to wait. He said "All right, I will do it." That he could [97] cross over. I did not know when I left him that he was going to get off on that side; to all intents and purposes he looked as if he was going to get off on the station side. I looked out to see if everything was clear; I had already told the man that he would have to get off on the station side, and that he could cross over. I didn't believe he was going to get off on that side. He was going to cross over there when the train stopped. I told him that after the train came to a stop he could cross over from one side of the train to the other through the vestibule. I did not tell him that I had to open up that vestibule to get back onto the train, I says, "Here, on account of picking up a helper I will open the vestibule on that side." I told him that just as a matter of accommodation,

(Testimony of Edward Mulville.)

so that while we were standing there he could cross over and go to the hotel. I was going to open this door anyway. I did not tell him anything about my climbing back onto the train at all. I told him I had to open one there on the opposite side of the train. I told him about this door being opened on the opposite side in order that he could cross over and not wait the ten minutes. He would, after the train was at a standstill, have to pass down those steps on that side in order to get through. I was trying to accommodate him, in that way. It was not a short cut, it was a saving of time. There was a porter on the head end of the chair-car to assist him and Mr. Moran in getting off that night. The porter's duty was not restricted to the chair-car, but included the whole train. He assists ladies; it did not appear that Mr. Moran and Mr. Murray wanted assistance. The porter was there, and the conductor came on afterwards. Right at that juncture I went to get that other passenger off, who was apparently asleep. I notified him and then went on to the front end of the smoking-car. We had but one baggage-car that night. There was one occasion before that I almost got injured in getting [98] back on the train through the vestibule door on the front end of the smoking-car, in alighting from the tender of the road engine. I didn't have sufficient time to get my balance and catch the head end of the smoking-car. Sometimes we have two baggage-cars, and in that case I would open the head end of the smoking-car so as to get on. But these cars are only sixty feet

(Testimony of Edward Mulville.)

long, and you are going at a fast rate of speed, and sometimes when you are alighting on the ground you can't go to work and get your balance in order to catch the head end of the smoking-car. From Santa Margarita to San Luis Obispo we had two engines, and I went up on the fireman's side and went around to the head end of the engine and got the engine off the siding, which is up on the opposite side of the station. In getting back aboard the train, I had a hand-lamp, and I would ride the tender of the train to—well, about a half mile out of town in order to keep the hoboes off the head end of the train; then I would drop off, and jump on again, about a half mile out, after the speed had been reduced to six miles an hour. They would reduce the speed for me, for the rules require a running test of air. That running test is made by the engineer by a reduction of the train pipe pressure, and the brakeman on the rear end stations himself on the platform where the retainer is placed, because the exhaust valve is there, and when the air exhausts through that, he knows the train line is coupled up all the way through. That is also done at the beginning of a grade—the San Luis Obispo mountain grade. That rule also requires that when the train line is in the clear—

Q. I will ask you if you did not testify as follows before the coroner's jury: "Q. Do you ordinarily open the door on that side of the train? A. Not ordinarily—it was case of this man. I [99] have known Mr. Murray for the last fifteen years, I was coming into the smoker, I had a little call at the

(Testimony of Edward Mulville.)

station in the chair-car and I was going through and he was standing in the middle of the smoker and he said, "Good night," he called me by my first name, and he said, "Well, I won't see you again," and I said "If you want to get out here, there is number 23, you are leaving Santa Margarita at 7:28 in the morning," he had already requested me to let him know what was the best train to take to see the country during the day and I told him, and I bid him good night,—and he says, "Where is the Santa Margarita Hotel," and I says, "It is on the opposite side from the station, the station *in* on one side and the Margarita Hotel is on the other," and I says, "You will see it just as we are going in there." He says, "I am hungry and I want to get off on that side." "Well," I says, "I will tell you what I will do, I will open this door—" "— What door did you refer to?

A. I didn't say "I will do it." I says, "I open the door." You said, "I will tell you what I will do."

A. Well, give me the question again, please.

Q. "Q. Do you ordinarily open the door on that side of the train? A. Not ordinarily—it was case of this man."

A. No, I didn't answer that way. I didn't say anything about the case of a man at all. That answer there was in answer to a question by the coroner, and he says, "Tell what you know about the case," and I started right in then to say that I knew Mr. Murray for fifteen years—

Q. Now, wait a minute, and I will show you this.

(Testimony of Edward Mulville.)

“Now,” I says, “I will tell you what I will do, I will open this door and you get off and go over the right of way, it will save you five or ten minutes as we take water.” Now, I ask you, when you answered that, if you did so answer it, what door did you refer to—
“I will open this door?” [100]

A. Why, I didn’t say, “I will open” it. When I answered that question, I says, “I will tell you what I do. I open the door on that side.” I was referring to the opposite side from the station, to the side the hotel was on. And I opened it, and informed him that I did it. I didn’t tell him he could get off at all. I had already told him where the station was, which side it was on, and told him he could cross over. (Witness examining transcript.) Now, referring to this, “Do you ordinarily open the door on that side?” I don’t ordinarily open the door on the opposite side of the train. The coroner then asked me: “Tell what you know about the case.” Then I started in: “I have known Mr. Murray for the last fifteen years. I was coming into the smoker—I didn’t say anything about—I did not make the answer that has been read by Mr. Bell. I said I had known Mr. Murray for the last 15 years, and coming into Santa Margarita I had already called out the chair-car, that I was going into the smoker to call out the station and Mr. Murray was standing on the right-hand side of the smoking-car, and then he asked if I knew where the Santa Margarita Hotel was, and I said, “Yes, the Margarita Hotel is on this side and the station is on this side.” He then said,

(Testimony of Edward Mulville.)

“Do you think the dining-room will be open?” I says, “I don’t know.” He says, “I am pretty hungry.” He didn’t have anything to eat. And regarding this, about opening the trap, I had already left him and came back, and I says, “I will tell you what I do, I open the vestibule on that side, and when the train stops you can cross right over there, and when it does stop it will be almost directly in front of the hotel.”

Redirect Examination.

(By Mr. GILBERT.)

Murray was picked up about 300 feet from where the car [101] stopped—the train had run about three hundred feet—about four cars. Murray was perfectly sober. When the vestibule door on the station side was opened, the train was going about twelve miles an hour; when the vestibule on the opposite side was opened about seven or eight miles.

(Witness excused.)

**[Testimony of A. B. Spear, for Plaintiff, in
Rebuttal.]**

Direct Examination.

(By Mr. BELL.)

I do not recall having had any conversation with the brakeman as to why he had opened the vestibule door on the opposite side of the train.

(At request of Mr. Bell, witness examines the transcript of testimony given by him before the coroner at the inquest.)

Q. Let me read it to you now: “Q. I would just like to ask you what the regulations or rules of the

(Testimony of A. B. Spear.)

company are as regards opening of the vestibule doors as applying to the Santa Margarita Station.

A. It is customary for passengers to detrain at the station side there as other places, there is a positive injunction against opening the vestibule doors opposite the station on double track." You so testified, did you? A. Yes.

Q. And that is correct, the matter you testified to?

A. Yes.

Q. "Is there double track at Santa Margarita?"

A. No, perfectly clear, that is no side track close to the track there." Is that the fact?

A. Yes, sir. [102]

Q. "Q. Then what would be your understanding that this positive rule forbidding the opening of vestibule doors on a side opposite the depot would apply to Santa Margarita? A. Well, no, I don't think so; in the case of this man, as I hear the brakeman say, it was an accomodation for the passenger who wished to go to the hotel, we are delayed there for five minutes always and sometimes longer, and he was expected to cross over there, or leave from that side of the train after the train had stopped."

Now, does that refresh your recollection.

A. Well, I suppose I testified to that.

Q. Did you hear the brakeman say why he had opened that vestibule door?

A. Well, that particular one being near or opposite the hotel would allow the passenger to cross over after the train has stopped, I think, as I understood it at that time. This was done to allow him to cross

(Testimony of A. B. Spear.)

over, but not to get off. He could get off at the station after the train was stopped, and then go on back through two vestibule doors and across the platform and then over to the hotel. He would have either to go around the end of the train to the hotel or while the train was standing still he could cross through. I gave no one permission to cross over that train while it was in motion, or to alight.

Q. I will ask you if you didn't testify as follows:

"Q. Who gives the brakeman instructions regarding which side of the train they shall open the vestibule doors. A. There are no instructions. Q. There is a regular set of rules governing these things?

A. There is a custom and rules covering that.
[103]

Q. They are supposed to be familiar with them?

A. Yes.

Q. Would you understand then, when Mr. Mulville opened this door, the vestibule door on the side of the train opposite from the depot to permit this passenger to alight on that side, that he was violating a rule of the company?" I call your attention to that question asked you by the coroner. "A. Well, if the passenger was not to alight until the train had come to a stop I think it would be perfectly safe." Did you so testify?

A. I suppose I did. A conductor is required to give no instructions in a case as to how those things are to be done.

Q. I asked you if you didn't testify as follows, and

(Testimony of A. B. Spear.)

if that doesn't correctly state the fact: Q. Would you understand then when Mr. Mulville opened this door, the vestibule door on the side of the train opposite from the depot to permit this passenger to alight on that side, that he was violating a rule of the company? A. Well, if the passenger was not to alight until the train had come to a stop, I think it would be perfectly safe."

Q. You so testified, did you not?

A. Yes, sir, I guess I did, and I intended to testify to the truth when I so testified.

(Plaintiff rests.) [104]

[Title of Court and Cause.]

Defendant's Motion for Nonsuit (in Bill of Exceptions).

Now comes the defendant, Southern Pacific Company, and moves the Court for a nonsuit; First, for the reason that the testimony offered is insufficient in law to establish a cause of action in favor of the plaintiffs and against the defendant company; second, for the further reason that the testimony offered fails to develop any act of negligence on the part of the defendant company from which the accident complained of resulted; third, for the reason that if negligence on the part of the defendant company has been shown as matter of law or fact in the opening of the door, then the deceased himself contributed to the injury by attempting to alight from the train while it was moving, as shown by the plaintiffs' testimony, at the rate of ten or twelve

miles an hour; and, fourth, for the further reason that the deceased having seen fit to alight from the train on the nonplatform side, while the train was in motion assumed the risks which were incidental to his attempt to alight.

HENRY T. GAGE,

W. I. GILBERT,

Attorneys for Defendant. [105]

*In the District Court of the United States of
America, in and for the Southern District of
California, Southern Division.*

#279.

MARY MURRAY, and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendants.

**Stipulation (in Bill of Exceptions) [as to Testimony
and Evidence on New Trial, etc.].**

WHEREAS a trial of the above-entitled action was had in the above-entitled court on the 27th and 28th days of November, 1914, the Court sitting with a jury, and a verdict and judgment was therein rendered and entered, in favor of the plaintiffs, and against the defendants, in the sum of five thousand dollars; and

WHEREAS thereafter, upon motion of the defendant for a new trial in said cause, the said verdict

and judgment was by the Court vacated and set aside; and

WHEREAS said cause has been set for trial in said court on the 7th day of September, 1915, at the hour of ten o'clock in the forenoon; and

WHEREAS it is deemed convenient by the parties hereto to submit said cause to said Court, sitting without a jury, upon all of the testimony and evidence taken and heard therein upon the said previous trial in said court, for the sole purpose of [106] permitting the defendant to move for a nonsuit therein upon any grounds which may be designated in said motion;

Now, therefore, it is hereby stipulated by the parties hereto that at the time said cause is called for trial on September 7th, 1915, at the hour of ten o'clock in the forenoon of that day, or at such time as the trial thereof may be continued by order of the Court or agreement of counsel herein, all of the testimony and evidence given and received upon the previous trial of said cause may be submitted to the Court, sitting without a jury, as fully and with like force and effect as though said testimony and evidence were actually given, admitted and heard upon a trial of said cause; that upon the submission of said testimony and evidence the defendant shall move for a nonsuit and dismissal of said action, upon such grounds as the defendant may specify in said motion; and thereupon said motion for a nonsuit shall be heard and determined by the Court; provided, however, that nothing herein contained shall be so construed as to prevent or affect the right of either or any of the parties hereto to appeal from

any order which may be made and entered upon the hearing and determination of said motion of nonsuit; and said order shall be deemed to be excepted to.

Dated August 26, 1915.

THEODORE A. BELL and
MILTON K. YOUNG,

Attorneys for Plaintiffs.

HENRY T. GAGE and
W. I. GILBERT,

Attorneys for Defendant. [107]

The foregoing engrossed bill of exceptions is presented by the plaintiffs for settlement as the bill of exceptions in said case to be used upon appeal or any motion or proceeding to be taken herein.

Dated this First day of October, 1915.

THEODORE A. BELL and
MILTON K. YOUNG,

Attorneys for Plaintiffs.

[Stipulation for Settlement of Bill of Exceptions.]

IT IS HEREBY STIPULATED AND AGREED between the attorneys for the plaintiffs and defendants, that the foregoing bill of exceptions has been correctly engrossed, and that the same is correct and may be settled and allowed.

Dated this First day of October, 1915.

HENRY T. GAGE and
W. I. GILBERT,

Attorneys for Defendant.

[Order Allowing Bill of Exceptions.]

The foregoing bill of exceptions on behalf of the plaintiffs having been examined by me and found correct, is hereby certified by me as being correct and

is allowed as the engrossed bill of exceptions in said case, to be used upon appeal or any motion or proceedings to be taken herein.

Dated this 5th day of October, 1915.

BLEDSOE,
Judge. [108]

[Endorsed]: Original. No. 279—Civil. In the District Court of the United States of America, in and for the Southern District of California, Southern Division. Mary Murray, et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Bill of Exceptions. Received Copy of the Within Bill of Exceptions this 1st day of October, 1915. Henry T. Gage and W. I. Gilbert, Attorneys for Defendant. Filed Oct. 15, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Milton K. Young, Atty. at Law, 716 Union Oil Bldg., Los Angeles, Cal., Attorney for Plaintiffs. [109]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.

MARY MURRAY, and LENA A. MURRAY, a
Minor, by Her Guardian *ad Litem*, MARY
MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Petition for Writ of Error

Mary Murray and Lena Murray, a minor by her

guardian *ad Litem*, Mary Murray, plaintiffs in the above-entitled cause feeling themselves aggrieved by the judgment entered on the 7th day of September, 1915, in the above-entitled cause, come now by Theodore A. Bell and Milton K. Young, their attorneys, and file herewith assignments of error, and petition said Court for an order allowing the said plaintiffs to procure a writ of error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided. And also that an order be made fixing the amount of security which the plaintiffs shall give and furnish upon said writ or error, and that a transcript of the records, proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the Circuit Court of Appeals of the United States, for the Ninth Circuit.

THEODORE A. BELL and
MILTON K. YOUNG,

Counsel for Plaintiffs in Error. [110]

[Endorsed]: Original. No. 279—Civil. In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Petition for Writ of Error. Filed Oct. 15, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Milton K. Young, Atty. at Law, 716 Union Oil Bldg., Los Angeles, Cal., and Theodore A. Bell, Attorneys for Plaintiffs. [111] |

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.

MARY MURRAY, and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Assignments of Error.

Now comes the above-named plaintiffs in error, by Theodore A. Bell and Milton K. Young, their attorneys, and file the following assignments of error upon which they will rely for the prosecution of the writ of error in the above-entitled cause, petition for which writ of error is filed at the same time as this assignment of errors:

I.

That the Court erred in granting defendant's motion for nonsuit, to which ruling of the Court plaintiffs by their counsel duly excepted.

II.

The Court erred in granting defendant's motion for nonsuit because the evidence showed that the accident complained of was the result of the negligence of the defendant and that [112] deceased was not guilty of such contributory negligence which, as a matter of law, would preclude the plaintiffs' right to recover.

III.

The Court erred in granting defendant's motion for nonsuit because the evidence showed that the accident complained of was the result of the negligence of the defendant.

IV.

The Court erred in granting, making, rendering and entering a judgment of nonsuit in said cause in favor of the defendant and against the plaintiffs.

WHEREFORE, the plaintiffs pray that the judgment of said Court be in all things reversed.

THEODORE A. BELL and

MILTON K. YOUNG,

Counsel for Plaintiffs in Error.

[Endorsed]: No. 279—Civil. In the Circuit Court of the United States, Ninth Circuit. In and for the Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, a corporation, Defendant. Assignments of Error. Filed Oct. 15, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Milton K. Young, Atty. at Law, 716 Union Oil Bldg., Los Angeles, Cal., and Theodore A. Bell, Attorneys for Plaintiffs. [113]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
tion,

Defendant.

Order for Writ of Error.

Upon motion of Theodore A. Bell and Milton K. Young, attorneys for plaintiffs, and upon filing a petition for a writ of error and assignment of errors,

IT IS ORDERED, that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein.

IT IS FURTHER ORDERED, that the plaintiffs in error file a good and sufficient bond in the penal sum of \$250.00 that they will prosecute their writ of error to affect, and that if they fail to make their plea good, that they shall answer all costs herein.

Dated this 28th day of October, 1915.

BLEDSON,
Judge.

[Endorsed]: Original. #279—Civil. In the Circuit Court of the United States, Ninth Circuit,

in and for the Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Order for Writ of Error. Filed Oct. 28, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Milton K. Young, Atty. at Law, 716 Union Oil Bldg., Los Angeles, Cal., and Theodore A. Bell, Esq., Attorneys for Plaintiffs. [114]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 279.

MARY MURRAY, and LENA MURRAY, a Minor,
by her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
tion,

Defendants.

Cost Bond.

KNOW ALL MEN BY THESE PRESENTS: That NEW ENGLAND EQUITABLE INSURANCE COMPANY, a corporation, is held and firmly bound unto Southern Pacific Company, a corporation, defendant above named, in the sum of two hundred and fifty dollars (\$250), lawful money of the United States, to be paid to it, or its successors; to which payment, well and truly to be made, we bind

ourselves, and our successors, by these presents.

WHEREAS, lately at the July term of the above court, in a suit depending in said court between Mary, and Lena Murray, a minor by her guardian *ad litem*, Mary Murray, plaintiffs, and Southern Pacific Company, a corporation, defendant, judgment was rendered against the said plaintiffs, and the said plaintiffs have obtained a writ of error of the said Court to [115] reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, at the City and County of San Francisco, thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said plaintiffs shall prosecute said writ of error to effect, and answer all damages and costs if plaintiffs fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

IN WITNESS WHEREOF said corporation has hereunto caused its name to be subscribed, and its corporate seal to be affixed, this 1st day of November, 1915.

NEW ENGLAND EQUITABLE INSURANCE COMPANY.

[Seal] By THEODORE P. STRONG,
Attorney in Fact.

[Two canceled revenue stamps.]

State of California,
City and County of San Francisco,—ss.

On this 1st day of November in the year one thousand nine hundred and fifteen, before me John E. Manders, a notary public, in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared Theodore P. Strong known to me to be the person whose name *his* subscribed to the within instrument, as the attorney in fact of the New England Equitable Insurance Company, the corporation described in the within instrument, and also known to me to be the person [116] who executed it on behalf of the corporation therein named, and the said Theodore P. Strong acknowledged to me that he subscribed the name of the New England Equitable Insurance Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, the day and year in this certificate first above written.

[Seal]

JOHN E. MANDERS,

Notary Public in and for the City and County of
San Francisco, State of California. 1303 Ho-
bart Building, 582 Market Street.

My Commission expires January 26, 1919.

[Endorsed]: 279. District Court of the United States, Southern District of California. Mary Murray, and Lena Murray, a minor, etc., Plaintiff, vs. Southern Pacific Company, a corporation,

Defendant. Cost Bond. Approved Nov. 8, 1915.
Bledsoe, Judge. Filed Nov. 9, 1915. Wm. M. Van
Dyke, Clerk. By R. S. Zimmerman Deputy Clerk.
[117]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern
District of California.*
Clerk's Office.

No. 279

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MUR-
RAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Praeceptum [for Transcript of Record].

To the Clerk of said Court:

Sir: Please prepare a transcript for me upon the writ of error in the Circuit Court of Appeals of the Ninth Judicial Circuit of the record in the above-entitled case, and include therein the plaintiff's complaint, the summons, the defendant's answer; the order of nonsuit and judgment thereon; the bill of exceptions as settled and allowed containing the testimony submitted at the trial on which said nonsuit was granted; the judgment-roll; petition for writ of error; assignment of errors; order

allowing the writ of error; the writ of error; the citation; the bond, and the certificate of the clerk authenticating the record.

THEODORE A BELL and

MILTON K. YOUNG,

Attorneys for Plaintiffs.

[Endorsed]: No. 279—Civ. U. S. District Court Southern District of California, Southern Division. Mary Murray et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Praecipe for Record on Writ of Error. Filed Nov. 12, 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Received copy of within Praecipe the 11th day of Nov. 1915. Henry T. Gage and W. I. Gilbert, Attys. for Deft. [118]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 279—CIVIL.

MARY MURRAY, and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
tion,

Defendant.

I. Wm. M. Van Dyke, clerk of the District Court of the United States of America, in and for the

Southern District of California, do hereby certify the foregoing one hundred and eighteen (118) typewritten pages, numbered from 1 to 118, inclusive, to be a full, true and correct copy of the Judgment-roll, Bill of Exceptions, Petition for Writ of Error, Assignments of Error, Order for Writ of Error, Bond on Writ of Error, and Praecipe for Preparation of Transcript, in the above and therein entitled action, and that the same together constitute the record in said action, as specified in the Praecipe for Preparation of Transcript filed in my office on behalf of the plaintiffs in error by their attorneys of record.

I do further certify that the cost of the foregoing Transcript is \$59.70/100, the amount whereof has been paid me by [119] Mary Murray, and Lena Murray, a minor, by her guardian *ad litem* Mary Murray, plaintiffs in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 31st day of December, in the year of our Lord, one thousand nine hundred and fifteen, and of our Independence, the one hundred and fortieth.

[Seal]

WM. M. VAN DYKE,
Clerk of the District Court of the United States of
America, in and for the Southern District of
California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
12/31/15. [L. S. C.] [120]

[Endorsed]: No. 2726. United States Circuit Court of Appeals for the Ninth Circuit. Mary Murray and Lena Murray, a Minor, by Her Guardian *ad Litem*, Mary Murray, Plaintiffs in Error, vs. Southern Pacific Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed January 4, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**[Order Enlarging Time to February 1, 1916, to File
Record in U. S. Circuit Court of Appeals.]**

*In the United States Circuit Court of Appeals,
Ninth Judicial Circuit.*

MARY MURRAY and LENA MURRAY, a Minor,
by Her Guardian *ad Litem*, MARY MURRAY,

Plaintiffs in Error,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant in Error,

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said plaintiffs in error to docket said cause and file the record thereof with the clerk of the United States Circuit

Court of Appeals, for the Ninth Circuit, be, and the same is hereby enlarged and extended to and including the first day of February, 1916.

Dated at Los Angeles, California, November 29th, 1915.

BLEDSON,
Judge.

[Endorsed]: No. 2726. United States Circuit Court of Appeals, for the Ninth Circuit. Mary Murray and Lena Murray, a Minor, by her Guardian *ad Litem*, Mary Murray, Plaintiffs in Error, vs. Southern Pacific Company, a Corporation, Defendant in Error. Order Extending Time to Docket Cause and File Record. Filed Dec. 6, 1915. F. D. Monckton, Clerk. Refiled Jan. 5, 1916. F. D. Monckton, Clerk.

